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RAILROAD REPORTS

(Vol. 60 American and English
Railroad Cases, New Series)

A COLLECTION OF ALL

CASES AFFECTING RAILROADS OF EVERY KIND,
DECIDED BY THE COURTS OF
LAST RESORT

IN THE

UNITED STATES.

EDITED BY

THOMAS J. MICHIE.

VOLUME XXXVII

THE MICHIE COMPANY, PUBLISHERS,
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RAILROAD REPORTS

RAILROAD COMMISSION OF OHIO v. HOCKING VALLEY RY. CO.

(Supreme Court of Ohio, March 15, 1910.)

[91 N. E. Rep. 865.]

Carriers—Unjust Discrimination—Competitive Rates.—In proceedings under "An act to regulate railroads and other common carriers in this state, create a board of railroad commissioners, prevent the imposition of unreasonable rates, prevent unjust discrimination and insure an adequate railway service," passed April 2, 1906 (98 O. L. 342), competition is an element to be considered in determining whether rates are reasonable and just; and the fact that a competitive rate is less than the rate of the other competing carrier does not of itself constitute undue and unreasonable discrimination. Such discrimination must be ascertained from a consideration of all the facts and circumstances of each case.

Carriers—Proceedings of Commission—Review—Presumptions.—Section 16, par. "e," of the said statute, does not apply to proceedings in error.

(Syllabus by the Court.)

Error to Circuit Court, Franklin county.

Petition by the Hocking Valley Railway Company against the Railroad Commission of Ohio to set aside an order of such Commission. From an order vacating the order of said Commission, it appealed to the circuit court, and from an affirmance it brings error. Affirmed.

Aaron E. Price, a citizen of the village of Athens, which is situated on the Hocking Valley Railway, complained to the Railroad Commission of Ohio, in substance, that the village of Athens is situated on the Hocking Valley Railway at a distance of 76.3 miles from the city of Columbus, measured along the right of way of said Hocking Valley Railway Company; that the village of Logan is located on the line of said railway at a distance of 49.6 miles from the city of Columbus; that the city of Lancaster is situated on the line of the defendant railway at a distance of 31.5 miles from the city of Columbus; and further complained that the Hocking Valley Railway Company charges and collects from passengers buying tickets from the village of Athens to the city of Columbus, or reverse, the sum of \$1.55; and that the said company charges for a round-trip ticket between Athens and Columbus the sum of \$3.10. The complainant further charges that the said railway company makes a practice of selling to any person applying for the same at Logan or Lancaster what is

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known as a "twin ticket," which twin ticket entitles the holder to one round trip on any of the passenger trains of the defendant from the station where said ticket is purchased to the other and return, or entitles two passengers to travel on any of the company's passenger trains from either of the stations where the twin ticket is purchased to the other locality; that the said twin tickets are sold at greatly reduced rates and at a much less rate per mile than is charged for tickets between Columbus and Athens and beyond Athens, thereby subjecting the complainant and other citizens of Athens to an undue and unreasonable disadvantage as compared to travelers between Logan and Columbus or Lancaster and Columbus.

The railway company admitted the allegations of the complainant in regard to the use of the twin ticket system, but denied that it was an unjust or undue and unreasonable preference and advantage, and denied that the company is violating the laws of the state of Ohio. The railway company, for further answer, alleged that in order to preserve its local passenger business between such points, and by reason of competition created by interurban electric traction railways, it had reduced its rates for a radius of about 50 miles north and south of Columbus, and in order to accommodate its business between said points had put on additional trains, which since May 13, 1905, have run and are running between Marion and Logan; and thereby it has increased the train service between those points and intermediate points. Upon hearing of the said complaint before the Railroad Commission of Ohio, said commission found against the railway company, and ordered that the defendant cease from the unjust and unreasonable discrimination, as alleged in the petition of the complainant, and as found to exist by the said commission. The Hocking Valley Railway Company thereupon filed its petition in the court of common pleas of Franklin county, as authorized by the statute, averring that the order made by the Railroad Commission was unlawful and unreasonable, and asking that the same be vacated and set aside. The Railroad Commission filed its answer in said court, and after trial the court vacated and set aside the said order, and thereupon the Railroad Commission appealed the case to the circuit court of Franklin county, which court held that the order of the Railroad Commission was unlawful and unreasonable and rendered the same judgment as had been rendered in the court of common pleas. The Railroad Commission prosecutes error to this court seeking to reverse the judgment of the circuit court of Franklin county and also that of the court of common pleas of Franklin county.

W. H. Miller, Asst. Atty. Gen. and *Daugherty & Todd*, for plaintiff in error.

Wilson & West, *C. O. Hunter*, and *Richard Inglis*, for defendant in error.

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DAVIS, J. (after stating the facts as above). The Railroad Commission seems to have based its conclusions upon the proposition that, under the Railroad Commission act (98 Ohio Laws, p. 342), a railroad is not authorized to lower its schedule of rates solely for the purpose of meeting competition; and that, even conceding to the railroad such right, a railroad cannot reduce its rate between competing points below the total rates of its competitor for the full distance between such points. In this we think the commission was clearly in error.

A careful reading and analysis of this statute has not disclosed to us any requirement that the rate per mile between any two points on a railroad shall be uniform with the rate per mile between any other two points on the same railroad. The only limitation upon rates is the broad one that they "shall be reasonable and just, and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful." Sections 3 and 23. Under this qualification the lawfulness or unlawfulness of the rate must be determined by all the circumstances related to each particular case. By universal consent self-defense is recognized as a natural right of every individual and of every collection of individuals. It follows, therefore, that whatever one does within the limits of protection of his person, or property, or business is just and reasonable. In other words, when competitive conditions are such as to really threaten one's property or business, they must necessarily be regarded as justifying retaliatory action, because the same is, by every instinct of man, just and reasonable.

But it is contended on the part of the commission that, conceding that competition is a factor to be reckoned, it should not be permitted to go below the competitive rate. This contention is not sound, because it is seldom that competition consists wholly in the rate. In the case at bar, the competition is between a steam railroad and an electric interurban road. For limited distances the former is at a disadvantage when carrying at the same rate as the latter. The comfort of passengers on the interurban roads is as great as on the steam railroad, if not greater; the frequency of service is in favor of the interurban; the speed on moderate distances is not greatly different; and the ratio of operating expenses to receipts is probably in favor of the interurban. The record seems to show that, notwithstanding the competitive rate, the amount of travel has increased on both lines, so that the competition has not been injurious to the traction line. Upon the whole case we see no reason to disturb the findings of the court of common pleas and of the circuit court that the rates complained of are not unjust, unreasonable, or unduly discriminatory. This is all that we deem it profitable to say upon the merits of the case. These matters were fully considered in the court of common pleas. 5 Nisi Prius Rep. (N. S.) 265.

It is suggested in the brief for the commission that section 16,

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par. "e," of the Railroad Commission act, gives prima facie effect to the findings of the commission; and that such finding should stand, unless clear and unmistakable evidence should require a reversal thereof. That is true so far as concerns the burden of proof, as distinguished from what may be called the burden of the issue. The statute applies to the determination of facts upon evidence; but it does not countervail the well-settled rule that, in proceedings in error, the presumption is in favor of the judgment, and that the court below applied the law correctly.

The judgment is affirmed.

SUMMERS, C. J., and CREW, SHAUCK, and PRICE, JJ., concur.

GILLILAND & GAFFNEY v. SOUTHERN RY. CO.

(Supreme Court of South Carolina, Feb. 21, 1910.)

[67 S. E. Rep. 20.]

Carriers—Carriage of Live Stock—Contracts—What Law Governs.—Where a contract of shipment of stock was made in one state and is to be performed partly in that state and partly in another, any question as to the nature, validity, and interpretation of the portion of the contract relating to safe transportation from the point of delivery to the point of destination would be determinable under the laws of the state where it was made, unless there is evidence of an intention that a different law should be applied.

Carriers—Carriage of Live Stock—Loss or Injury—Limitation of Liability.*—According to the rule in Georgia, under a bill of lading by which a shipper contracts that he will load and unload stock at his own risk, and feed, water, and attend them at his own expense and risk while in the yards awaiting shipment, and on the cars, or at feeding or transfer points, or where unloaded for any purpose, he cannot hold the carrier liable for injuries resulting from failure to properly load and unload, or for lack of feed, water, or attention, it is the shipper's duty to load and unload and to supply food, water, and attention, but it is the carrier's duty to supply a proper place to unload and to have proper protection for the stock and if injured because unloaded at some place provided by defendant, unsuitable and unfit therefor, the carrier will be responsible for injury resulting from their being unloaded there; that being as much in its control as the running of its trains.

*As to the duties and liabilities of a railroad as a carrier of live stock with respect to stock-yards and pens, see extensive note, 25 R. R. R. 323, 48 Am. & Eng. R. Cas., N. S., 323; first foot-note of Atchison, etc., Ry. Co. v. Allen (Kan.), 26 R. R. R. 338, 49 Am. & Eng. R. Cas., N. S., 338.

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Commerce—Interstate Shipments—Carriage of Live Stock—What Law Governs.—To the extent that U. S. Comp. St. Supp. 1907, pp. 918, 919, Supp. 1909, pp. 1178, 1179, §§ 1, 2, fixes the duties and liabilities of the shipper and carrier in interstate transportation, it is obviously controlling, and displaces any state law on the subject.

Carriers—Limitation of Liability—Interstate Commerce.—As to interstate commerce, a common carrier cannot contract for exemption from liability for injuries resulting from his own negligence.

Carriers—Injury to Stock—Exemption from Liability—Burden of Proof.—Under a contract for interstate shipment of stock exempting the carrier from its usual liability, the burden is on it to exempt itself by showing that injury thereto resulted, not from its negligence, but from the breach of contract or negligence of the owner or shipper.

Carriers—Exemption from Liability—Contracts—Construction.—Stipulation for exemption from liability are to be construed strictly against the carrier.

Carriers—Carriage of Live Stock—Statutes—Construction—Liability for Injury—Interstate Shipment.—In the absence of federal decisions on the question, U. S. Comp. St. Supp. 1907, p. 918, Supp. 1909, p. 1178, regulating interstate shipments of stock, which is substantially the same as the state statute regulating shipments of stock within the state, must be given the same construction and effect, and the carrier of an interstate shipment be held liable for injuries resulting from its failure to supply proper shelter and protection when stock are unloaded to be fed and watered.

Carriers—Carriage of Live Stock—Claim for Damages—Waiver of Notice—Evidence.—Evidence held sufficient to carry to the jury the question of waiver by a carrier of live stock of notice of claim for damages for injuries before they were unloaded or intermingled with other stock.

Carriers—Carriage of Live Stock—Claim for Damages—Waiver of Notice.—By the law of Georgia a stipulation in a contract of carriage of stock, requiring notice in writing of the claim for damages for injuries before stock are unloaded and intermingled with other stock, may be waived by the carrier.

Evidence—Presumptions—Laws of Other States.—In absence of proof to the contrary, it must be presumed that the same evidence would be sufficient to carry a case to the jury on a particular issue in another state as in this state.

Principal and Agent—Evidence of Agency—Presumptions—Person Responding at Telephone.—One who answers a telephone call from the place of business of a person called for, and undertakes to respond as agent, is presumed to speak for him as to matters of general business carried on by such person at that place.

Evidence—Admissions—Agent—Person Responding at Telephone.—The presumption that the person who answers a telephone call from the place of business of a person called for is authorized to

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speak for him may be very slight or strong according to the circumstances, but his statements should be admitted in evidence as prima facie the statements of one having authority to speak.

Evidence—Admissions—Evidence of Agency—Person Responding at Telephone.—Identification of the person responding as agent to a telephone call at another's place of business is unnecessary to the admissibility of his statements in evidence as prima facie those of one having authority to speak.

Appeal from Common Pleas Circuit Court of Spartanburg County; J. C. Klugh, Judge.

Action by Gilliland & Gaffney against the Southern Railway Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

Sanders & De Pass, for appellant.

Wilson & Osborne, for respondents.

WOODS, J. On February 27, 1907, the plaintiffs, dealers in horses and mules, shipped a carload of stock consisting of 11 horses and 5 mules from Atlanta, Ga., to Spartanburg, S. C., over the defendant's railroad. A judgment was recovered for injuries to the stock in transit under this allegation: "That at Greenville, South Carolina, a station on its line, defendant unloaded such stock in an unfit, unsuitable, and unprotected place, where for several hours they were subjected in the mud to very severe cold, rain, wind, and sleet; in consequence of which they contracted severe colds and other ailments, were stiffened, hair-turned, and rendered unsalable, and permanently injured, and plaintiffs thereby made to suffer much damage." It was further alleged in the complaint that the plaintiff had specially warned the defendant not to expose the stock to such weather.

The first defense was a general denial, but the defense involved in the appeal is that the plaintiffs, in consideration of a reduced freight rate, made a contract with the defendant, embodied in the bill of lading in this language: "That he will load and unload said animals at his own risk, and feed and water and attend the same at his own expense and risk while they are in the stockyards of the railway company awaiting shipment, and while on the cars, or at feeding or transfer points, or where they may be unloaded for any purpose, whether arising from accident or from delay of trains, or otherwise, and to that end he or his agent in charge of said live stock shall pay regular published passenger fare when proper, under rules governing transportation of live stock, and shall ride upon the freight train in which said animals are transported, and in case the railroad company shall furnish laborers to assist in loading and unload-

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ing or caring for said live stock, they shall be subject to the orders and shall be employees of the party of the second part while so assisting, provided, however, that in the event that the party of the second part shall fail to properly care for, feed, or water the said live stock during transportation the railroad company may itself care for, water, and feed the same at the expense of the owner thereof, and shall and may have a lien upon the said live stock for the amount of its expenditures in that respect." The answer further alleges: "That the plaintiffs failed to attend to the said horses and mules, or to unload, feed, and water and care for the same, as they had contracted to do, and that any injuries which came to the said animals were caused by the failure of the plaintiffs to comply with their said contract, as hereinbefore stated." The answer set up also this provision of the contract: "That as a condition precedent to any right to recover any damages for loss or injury to said live stock, notice in writing of the claim thereof shall be given to the agent of the carrier actually delivering said live stock, wherever such delivery may be made, and such notice shall be given before said live stock is removed or is intermingled with other live stock;" and alleged that the plaintiff unloaded the stock and allowed it to be mingled with other stock before making any claim.

The evidence offered by the plaintiff, none of which was disputed, tended to establish these facts: The horses and mules were delivered in good condition to the defendant company in Atlanta, and a bill of lading was issued, containing the stipulations above set out. Neither of the plaintiffs accompanied the stock or made any provision for their care. The defendants unloaded the animals in their yard at Greenville, an intermediate station; and fed and watered them. This was done at night in a very cold rain, and the yard was uncovered and muddy. The plaintiffs attempted to prevent the unloading on account of the severity of the weather, but when the message reached Greenville the horses and mules were already in the yard.

The first position taken by the defendant's counsel is that the circuit judge should have directed a verdict as requested by them on two grounds: First. "That under the law of Georgia it was the duty of the plaintiffs, under their contract with the defendant, to go along with the animals, at their own risk, feed, water, and attend to the same, and, as the evidence shows conclusively that they failed to do so, they could not under the law of Georgia recover against the defendant for any damages done said animals while being fed and watered by the defendant in the absence of the plaintiff." Second. "That the plaintiffs failed to give notice of the injuries to the stock to the agent of the defendant delivering it, as required by the other clause of the bill of lading set out in the answer. The contract of ship-

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ment was made in Georgia and required part performance in that state and part in South Carolina. The rule which prevails in most jurisdictions, including this state, is that under such conditions any question as to the nature, validity, and interpretation of that portion of the contract to be performed partly in Georgia and partly in South Carolina, namely the portion which related to safe transportation from the point of delivery to the point of destination, would be determinable under the laws of Georgia, unless there was evidence of the intention of the parties that a different law should be applied. *Frasier v. Charleston & Western Carolina Ry.*, 73 S. C. 140, 52 S. E. 964; Wharton on Conflict of Laws, 1062-1064. The record indicates that the circuit judge adopted the general rule and applied the laws of Georgia in the trial of the case. The Supreme Court of Georgia has held, as shown by the reports of that state introduced by the defendant, that under such a bill of lading as this the shipper cannot hold the carrier liable for injuries which resulted from failure to properly load and unload the stock, or for lack of feed, water, and attention; because the shipper undertakes to load and unload, and to supply necessary feed, water, and attention. *Susong v. Fla. Cent. R. R. Co.*, 115 Ga. 361, 41 S. E. 566; *Seaboard R. R. v. Cauthen*, 115 Ga. 422, 41 S. E. 653; *Central of Georgia R. Co. v. James*, 117 Ga. 832, 45 S. E. 223. But that court has also held that for a common carrier to avail itself of an exception to its usual liability, set out in the contract of shipment, it must show that the injury and loss fell within the exception, and were not caused by its negligence. *Atlanta, etc., R. R. Co. v. Broome*, 3 Ga. App. 641, 60 S. E. 355; *Carter v. Sou. R. R. Co.*, 3 Ga. App. 34, 59 S. E. 209. Applying the law as thus laid down, it was the duty of the shipper to load and unload and to supply food, water, and attention, but it was the duty of the railroad company to supply a proper place to unload the stock and to have proper protection for them; and if the horses and mules were injured because the carrier neglected to have a proper place and proper protection for the unloading, it would be liable for the resulting injury. There as evidence tending to show that the injury was due to the negligence of the carrier in these particulars, and therefore the circuit judge was right in refusing to instruct the jury that the mere fact that the animals were injured "while being fed and watered" would, under the law of Georgia, prevent recovery, and in charging instead: "The stipulation between the plaintiff and the defendant in this part of the contract does not refer to the place where the stock is to be unloaded except to refer to the stockyards and transfer and feeding points. The matter of transfer and feeding points is a matter that is within the control of the railroad company, and not of the plaintiff, and is not embraced in this stipulation of

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the contract. * * * If the stock were unloaded at some place provided by the railroad, and that place was unsuitable and unfit for that purpose, then if injury resulted to the stock from the fact of their being unloaded there, that would be a matter for which the railroad would be responsible, and not the plaintiff. That would be as much in the control of the plaintiff as the running of its trains." As both parties acquiesced in the application of the laws of Georgia, this conclusion as to the law of that state is decisive of the question now under consideration as made in this case, whether the laws of Georgia were really applicable or not. There is, however, a federal statute which was not called to the attention of the circuit court. It provides:

"That no railroad, express company, car company, common carrier other than by water, or the receiver, trustee, or lessee of any of them, whose road forms any part of a line of road over which cattle, sheep, swine or other animals shall be conveyed from one state or territory or District of Columbia or the owners or masters of steam, sailing or other vessels carrying or transporting cattle, sheep, swine or other animals from one state or territory or District of Columbia into or through another state, territory or District of Columbia, shall confine the same in cars, boats, or vessels of any description for a period longer than twenty-eight consecutive hours without unloading the same in a humane manner, into properly equipped pens for rest, water and feeding, for a period of at least five consecutive hours, unless prevented by storm or other accidental or unavoidable causes which cannot be anticipated or avoided by the exercise of due diligence or foresight: Provided, that upon the written request of their owner or person in custody of that particular shipment, which written request shall be separate and a part from any printed bill of lading, or other railroad form, the time of confinement may be extended to thirty-six hours. In estimating such confinement, the time consumed in loading and unloading shall not be considered, but the time during which the animals have been confined without such rest or food or water on connecting roads shall be included, it being the intent of this act to prohibit their continuous confinement beyond the period of twenty-eight hours, except upon the contingencies hereinbefore stated: Provided, that it shall not be required that sheep be unloaded in the nighttime, but where the time expires in the nighttime in case of sheep the same may continue in transit to a suitable place for unloading, subject to the aforesaid limitation of thirty-six hours.

"Sec. 2. That animals so unloaded shall be properly fed and watered during such rest either by the owner or person having the custody thereof, or in case of his default in so doing, then by the railroad, express company, car company, common carrier

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other than by water, or the receiver, trustee, or lessee of any of them or by the owners or masters of boats or vessels transporting the same, at the reasonable expense of the owner or person in custody thereof, and such railroad, express company, car company, common carrier other than by water, receiver, trustee or lessee of any of them, owners or masters, shall in such case have a lien upon such animals for food, care and custody furnished, collectible at their destination in the same manner as the transportation charges are collected, and shall not be liable for any detention of such animals, when such detention is of reasonable duration, to enable compliance with section one of this act; but nothing in this section shall be construed to prevent the owner or shipper of animals from furnishing food therefor, if he so desires." U. S. Comp. St. Supp. 1907, pp. 918, 919, Supp. 1909, pp. 1178, 1179.

To the extent that this statute fixes the duties and liabilities of the shipper and carrier in interstate transportation, it is obviously controlling, and displaces any state law on the subject. With respect to interstate commerce the Supreme Court of the United States adheres to the rule that a common carrier cannot contract for exemption from liability for the injuries resulting from its own negligence; and that under a contract like that evidenced by the bill of lading in this case, the burden is on the carrier to exempt itself from liability by showing that the injury resulted not from its negligence, but from the breach of contract or negligence of the owner or shipper; and, further, that any stipulations for exemption from liability are to be construed strictly against the carrier. *Chicago, M. & St. P. Ry. v. Solan*, 169 U. S. 133, 18 Sup. Ct. 289, 42 L. Ed. 688; *Niagara v. Cordes*, 21 How. 7, 16 L. Ed. 41; *New Jersey, etc., Co. v. Merchants' Bank*, 6 How. 344, 12 L. Ed. 465; *Texas, etc., R. R. Co. v. Reiss*, 183 U. S. 621, 22 Sup. Ct. 252, 46 L. Ed. 358. We have found no case from any of the federal courts deciding that in a case like this the carrier would be liable, or indicating that the carrier would be liable in any case to the owner under a contract like that now under consideration for injuries resulting from failure to provide food, water, and proper attention when the owner fails to do so. The federal statute regulating interstate shipments of stock is however substantially the same as the state statute, regulating shipments of stock within the state, the only point of difference material here being that the statute imposes upon the owner the duty to feed, water, and shelter during the period of rest, while the duty to shelter is not imposed on the owner in the federal statute. In construing the same statute this court held that as the statute requires the carrier to feed, water, and shelter the stock in case the owner failed to do so, and gives the carrier a lien for expenses incurred, the carrier is liable to the owner for injuries resulting from failing to supply proper food, water and shelter. *Comer v. R. R. Co.*, 52 S. C. 36, 29 S. E. 637; *Craw-*

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ford v. R. Co., 56 S. C. 136, 34 S. E. 80. In the absence of federal decisions on the question we must give the same construction and effect to the federal statute, and hold that the carrier is liable to the owners for injuries resulting from its failure to supply proper shelter and protection at Greenville, when the horses and mules were unloaded to be fed and watered. The conclusion is that in no view of the law can the exceptions on this point be sustained.

The second ground on which the defendant requested the court to direct a verdict is also untenable. The plaintiff, it is true, did not give notice in writing, to the carrier's agent who delivered the stock, of the claim for damages for injuries before the horses and mules were unloaded and intermingled with other stock, and the bill of lading expressly stipulated that such notice should be a condition precedent to any right to recover damages for loss or injury to the stock; but there was evidence of waiver of this condition sufficient to carry the case to the jury. The plaintiff, Gaffney, testified that after the horses and mules had been unloaded and mingled with other stock he called for telephone connection with defendant's office; that some one answered and told him to get a veterinary surgeon and have an examination made of the injured animals, and the company would settle the bill; and that he complied with the request. If the request on which the plaintiffs acted—that the plaintiffs should take the pains to procure a veterinary surgeon and have him examine the injured stock—was made by defendant's authorized agent, it was evidence of waiver to go to the jury; for "the party to be charged waives the forfeiture if with knowledge of the facts he requires the claimant to do some act, or incur some trouble or expense, inconsistent with the position that the contract had become inoperative in consequence of the breach of its conditions." *Hays v. Tel. Co.*, 70 S. C. 22, 48 S. E. 610 (67 L. R. A. 481, 106 Am. St. Rep. 731); *Madden v. Phoenix Ins. Co.*, 70 S. C. 295, 49 S. E. 855; *Cobb & Seal v. Ins. Co.*, 78 S. C. 397, 58 S. E. 1099; *Davis v. R. R. Co.*, 81 S. C. 472, 62 S. E. 856. Even if the Georgia law be applied, the case of *Arnold v. Louisville & Nashville R. R. Co.*, 4 Ga. App. 519, 61 S. E. 1050, introduced in evidence by the plaintiff, and the cases cited in the opinion of the court show that in Georgia such stipulation may be waived by the carrier. In the absence of proof to the contrary, we must presume that the same evidence would be sufficient to carry the case to the jury on the issue of waiver in that state as in this.

But the defendant's counsel contends that there was no evidence that the request given over the telephone to the plaintiff Gaffney that he procure a veterinary surgeon was made by the defendant. The soundness of this proposition depends on whether one who answers a telephone call from the place of business of the person called for, and undertakes to respond as

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the agent, is presumed to speak for him in respect to matters of the general business carried on by such person at that place. The authorities are not in accord, but we think the weight of reason and authority is in favor of such presumption. Those who install telephones in their places of business in connection with a telephone exchange, and use them for business purposes, impliedly invite the business world to use that means of communicating with them with respect to the business there carried on; and the presumption is that they authorize communications made over the telephone in ordinary business transactions. *Gen. Hosp. Co. v. New Haven, etc., Co.*, 79 Conn. 581, 65 Atl. 1065, 118 Am. St. Rep. 173, and note; note 6 L. R. A. (N. S.) 1180; *Godair v. Ham Nat. Bank*, 225 Ill. 572, 80 N.E. 407, 116 Am. St. Rep. 172, and note; *Wolfe v. Mo. Pac. Ry. Co.*, 97 Mo. 473, 11 S. W. 49, 3 L. R. A. 539, 10 Am. St. Rep. 331; 3 Wigmore on Evidence, § 2155; *Reed v. Ry.*, 72 Iowa, 166, 33 N. W. 451, 2 Am. St. Rep. 243; *Oskamp v. Gadsden*, 35 Neb. 7, 52 N. W. 718, 17 L. R. A. 440, 37 Am. St. Rep. 428. The reason is the same as that for the presumption that a business letter, properly directed, and sent by mail, reaches the business office of the addressee, and is opened by him or his authorized agent. The presumption that the person who answers is authorized to speak may be very slight or strong, according to the circumstances, but the statements of such persons should be admitted in evidence as prima facie the statements of one having authority to speak. It is important to observe that the presumption extends only to communications relating to the usual business carried on at the place from which the telephone communication comes. To illustrate the rule and the limitation: There is a presumption that a communication purporting to come from a local railroad freight office, relating to loss or injury incurred by owners of freight shipped to the station where the office is located are made by authorized agents; but there would be no presumption that a telephone communication purporting to come from such a local freight office, relating to the general management of the road, was authorized by the railroad company. Some authorities hold such communications not competent unless the witness identified the voice as that of an employee in the place of business of the party to be charged. *Young v. Seattle Transfer Co.*, 33 Wash. 225, 74 Pac. 375, 63 L. R. A. 988, 99 Am. St. Rep. 947; *Planters' Cotton Oil Co. v. W. U. Tel. Co.*, 126 Ga. 621, 55 S. E. 495, 6 L. R. A. (N. S.) 1180. We do not think such identification necessary to the admissibility of the evidence, for the reason above stated. But even if that rule were adopted, the evidence here was admissible, because Gaffney testified that he recognized the voice as that of a clerk in defendant's office.

The judgment of this court is that the judgment of the circuit court be affirmed.

SOUTHERN EXPRESS CO. v. R. H. MEYER CO.

(Supreme Court of Arkansas, Feb. 14, 1910.)

[125 S. W. Rep. 642.]

Carriers—Carriage of Goods—Limitation of Liability.*—Where a shipper had no opportunity to ship under any other than a contract of limited liability, he was entitled to recover for the loss of the goods, regardless of the contract.

Carriers—Carriage of Goods—Contract Limiting Liability—Validity.—A contract for an interstate shipment of goods, limiting the liability of the carrier to loss occurring while the goods were in its possession and the damages to a stated amount, was void in these particulars and cannot affect the shipper's right to recover for their loss.

Appeal from Circuit Court, Craighead County; Frank Smith, Judge.

Action by the R. H. Meyer Company against the Southern Express Company. From a judgment for plaintiff, defendant appeals. Affirmed.

The appellee delivered to appellant at Jonesboro, Ark., certain mink hides for transportation to New York. One lot was consigned to Joe Frak, and another lot to J. T. Silverstein. Appellee alleged that these were interstate shipments, and that appellant "then and there agreed to safely deliver said hides to their destination, which it failed and refused to do, to plaintiff's damage in the sum of \$200." The complaint had two counts, which were the same, except the different consignees were named. Appellant answered, admitting that it received a bale of furs of appellee for shipment. It set up that the furs were shipped under a written contract by which appellant's liability was limited to loss or damage while the furs were in appellant's possession; that appellant delivered the furs to its connecting carrier and thereupon its liability ceased. Appellant further set up "that it was provided in the written contract of shipment that in no event should appellant be liable for loss or damage for more than \$50, unless a just and true value of the furs was stated in the contract and an extra charge paid or agreed to be paid for transportation, which extra charge was to be based upon the value in excess of the sum of \$50; that at the time of making the contract the value of the furs was not declared or made known to appellant; that it had no knowledge or information with reference thereto; * * * that it was an interstate carrier, and filed with the

*See generally, extensive note, 28 R. R. R. 384, 51 Am. & Eng. R. Cas., N. S., 384.

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Interstate Commerce Commission a schedule of its rates for carriage and service with reference to interstate carriage, had properly published such rates, and that thereunder the rate for carrying goods increased in proportion as the value of the shipment exceeded \$50; that by the terms of the written agreement appellant was not liable for a sum in excess of \$50; that to permit appellee to fix or prove value of the furs at a sum in excess of \$50 would make the rates and charges for transportation illegal and discriminatory, and in violation of the interstate commerce laws of the United States." There was evidence to sustain the allegations of the complaint, and also evidence on behalf of appellant to sustain the allegations of its answer as to the written contract of shipment; but there was no evidence showing what appellant charged appellee for the shipments in suit. There was no evidence to the effect that appellant had an unlimited liability rate and that it gave appellee the privilege of shipping by that rate. So far as the evidence abstracted in this record shows, appellee had no opportunity to ship under any other.

At the request of appellee, the court gave the following declarations of law: "(1) A shipper who delivers freight to a common carrier of the value of more than \$50, and without any agreement, or knowledge as to the rate of freight to be charged for transportation, accepts, without reading or having his attention called to the contents, a receipt limiting the liability of the carrier to \$50 in event of loss or damage to the shipment, is not bound by the clause limiting the amount of recovery. (2) The court declares the law to be that, where a shipper delivers to a carrier freight to be transported from a point in one state to a point in another state, the carrier has no legal right to deliver to the shipper a bill of lading or receipt limiting its liability for loss or damage to such property to any certain sum, and, if it does so, such limitation is not binding upon the shipper. (3) The interstate commerce act (section 20) provides that all carriers shall be liable for any loss or damage to property caused by it, or any common carrier to which it may deliver property, and that no receipt or rule shall exempt it from such liability." To which exceptions were properly saved. The appellant prayed findings of fact and declarations of law in harmony with the allegations of its answer and the evidence it adduced. The court refused its prayers, and it duly excepted.

From a judgment rendered in favor of appellee for \$400 and interest this appeal has been duly prosecuted.

Robert C. Alston and Lamb & Caraway, for appellant.
Hawthorne & Hawthorne, for appellee.

WOOD, JJ. (after stating the facts as above). As appellee, under any other than a contract of limited liability, he was entitled

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to recover under the decision of this court in *Railway v. Wells*, 81 Ark. 469, 99 S. W. 534.

As the contract under which these shipments were made limited the liability of appellant to loss occurring while in its possession, and limited the damages to the amount stated in the contract, it was void in these particulars, and appellee was also entitled to recover under the doctrine of this court announced in *St. L. S. W. Ry. Co. v. Grayson*, 89 Ark. 154, 115 S. W. 933, *K. C. S. Ry. Co. v. Carl*, 121 S. W. 932, and *Smeltzer v. St. L. & S. F. Ry. Co. (C. C.)* 158 Fed. 649. See, also, *C., R. I. & P. Ry. Co. v. Miles*, 123 S. W. 775.

Affirmed.

DELASHMUTT et al. v. CHICAGO, B. & Q. R. Co. et al.

(Supreme Court of Iowa, May 13, 1910.)

[126 N. W. Rep. 359.]

Railroads—Liability of Lessees.—Under Code, § 2039, providing that all the duties and liabilities imposed by law upon railroad corporations shall apply to lessees or others operating such railroads, a lessee railroad would be liable for damages caused by constructing a bridge over a ditch so as to obstruct the free flow of water therein.

Waters and Water Courses—Water Courses—Obstruction of Streams by Bridges.*—A railroad company is bound to construct and maintain a bridge over a stream so as not to obstruct the passage of water therein, and is liable for damage caused by its failure to do so.

Railroads—Leases—Liabilities of Lessor.†—A railroad company cannot avoid obligations imposed upon it by law by voluntarily leasing its road so that a lessor railroad company was jointly liable with its lessee for damage caused by the construction of a bridge by the latter so as to obstruct the flow of water in the stream; Code, § 2066, authorizing a railroad company to lease its road, not exempting it from such liability.

*For the authorities in this series on the subject of the liability of a railroad for discharging water upon the property of others, see foot-note of *Blunck v. Chicago & N. W. Ry. Co. (Iowa)*, 33 R. R. R. 24, 56 Am. & Eng. R. Cas., N. S., 24; *Alabama & M. R. Co. v. Beard (Miss.)*, 33 R. R. R. 41, 56 Am. & Eng. R. Cas., N. S., 41; *St. Louis, etc., Ry. Co. v. Walker (Ark.)*, 33 R. R. R. 46, 56 Am. & Eng. R. Cas., N. S., 46; *Western Maryland R. Co. v. Martin (Md.)*, 33 R. R. R. 397, 56 Am. & Eng. R. Cas., N. S., 397.

†For the authorities in this series on the subject of the liability of a lessor railroad for the torts of its lessee, see first foot-note of *Big Sandy, etc., Co. v. Blakenship (Ky.)*, 34 R. R. R. 213, 57 Am. & Eng. R. Cas., N. S., 213; foot-note of *Parker v. North Carolina R. Co. (N. Car.)*, 33 R. R. R. 11, 56 Am. & Eng. R. Cas., N. S., 11.

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Railroads—Leases—Liability of Lessor—Joint Liability.—The lessor and lessee of a railroad both being liable for proper construction and maintenance of a bridge, they are jointly liable.

Waters and Water Courses—Water Courses—Obstructions—Actions—Instructions.*—In an action against a railroad company for injuries to plaintiff's land by the construction of a bridge over a ditch so as to obstruct the water therein, the court instructed that it was defendant's duty to provide passageways for the water reasonably sufficient to allow it to flow without being diverted from its natural course, so as to injure another's property, and it must anticipate and provide for such floods as occur in the course of nature, and provide for such unusual storms as may occasionally occur, whether ordinary or extraordinary, but was not bound to provide culverts for unprecedented floods which could not reasonably be foreseen. Held, that the instruction merely required the exercise of reasonable care to construct a bridge which would permit the free flow of such a volume of water as might reasonably be expected, and did not impose too great a burden upon the company.

Waters and Water Courses—Damage—Obstruction—Liability.—If the negligence of a railroad company in constructing a bridge over a ditch concurred with that of the builders of the ditch so as to cause water to overflow and injure plaintiff's land, the railroad company would be liable for such damage; plaintiff not being at fault for the negligent construction of the ditch.

Waters and Water Courses—Obstruction—Actions—Instructions.—In an action against a railroad company for damage to land by being flooded by the breaking of a ditch levee, caused by the obstruction of the flow of water in the ditch by a bridge, the court instructed that if the flood was not extraordinary and unprecedented, but the bridge did not have sufficient water space to accommodate the flow of water in the ditch at all times except in case of extraordinary or unprecedented floods, the jury could find defendant negligent, and further instructed that if the break in the ditch was caused by its defective construction, or the faulty construction of the levee, or by negligence in maintaining them, the insufficiency of the waterway under the bridge was not the proximate cause of the breaking of the levee, so that plaintiff could not recover. Held that, in view of the last instruction, the jury could not have understood that the railroad company was liable if the break in the levee was caused by the negligent construction of the drainage ditch.

Waters and Water Courses—Maintenance—Waters—Obstruction—Injury—Actions—Damages.—Plaintiff was entitled to the fair and reasonable market value, as shown by all the circumstances, of crops destroyed by the overflow of his land by the obstruction of a levee ditch by the constructing of a railroad bridge.

Pleading—Amendment—Time.—In an action against a railroad

See (*) on preceding page.

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company for damages by the overflow of land by the obstruction of water in a levee ditch by a bridge, plaintiff could amend before verdict so as to increase the amount of damages claimed.

Continuance—Grounds.—After a federal District Court had adjudged that a case was not removable to the federal court and remanded it, defendant was not entitled to a second order of removal, and hence could not claim a postponement of trial in order to petition therefor.

Appeal and Error—Abstracts—Amendment.—Where appellee's original abstract did not contain the record, and it did not appear until appellants' argument that a part of the record containing a petition for removal to the federal court, and orders of removal and remand, would be necessary to understand the questions presented on appeal, appellee could amend his abstract by embodying therein the proceedings and orders for removal.

Appeal and Error—Record—Contents—Proceedings for Removal of Cause.—Defendants' petition for removal of the cause to a federal court and the orders removing the case and remanding it to the trial court are a part of its record, which may be made a part of the record on appeal.

Appeal from District Court, Mills County; N. W. Macy, Judge.

Suit to recover damages alleged to have been caused by an insufficient waterway under one of appellants' bridges. There was a verdict and judgment for the plaintiffs. The defendants appeal. Affirmed.

W. S. Lewis and *W. E. Mitchell*, for appellants.

C. E. Dean, Genung & Genung, and *John Y. Stone*, for appellees.

SHERWIN, J. In 1907 the plaintiffs, as partners, were engaged in farming a large tract of land, and they were damaged by water which passed onto a part of said land through a break in the west levee of the Pony Creek ditch. The Chicago, Burlington & Quincy Railroad Company is the owner of a north and south road that crosses the ditch in question on a steel girder bridge about 66 feet in length; the distance between the banks of the ditch at that point being 50 feet or more. The steel girders are about 6½ feet wide, and at the time in question they extended below the top of the ditch levees from 2 to 3 feet. Where the defendants' road crosses it, the ditch is constructed practically east and west, but about a half a mile east of said point the ditch curves and runs almost directly north for some distance. In the evening of the 14th of July, 1907, there was a rainfall of 3 or 3½ inches in that locality. The water filled the ditch so full that it overflowed the levees on both sides in many places, and

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broke through the west levee just north of the curve in the ditch of which we have spoken, doing the damage for which plaintiffs ask a recovery. The plaintiff claim that the break in the levee was caused by the defendants' obstruction of the ditch with its bridge.

The question of a misjoinder of parties defendant was properly raised in the trial court, and both defendants now insist that they were improperly joined. While the Chicago, Burlington & Quincy Railroad Company was the owner of the road, it leased the same to the Chicago, Burlington & Quincy Railway Company in 1901, and the latter company operated it until the 30th day of June, 1907, when the lease was canceled and the possession and operation thereof was surrendered to the former company. It is therefore undisputed that on the 14th day of July, 1907, the railway company was not in possession of or operating the road, and based upon such fact the railway company contends that it is not liable for plaintiff's loss. The railroad company urges that it is not liable for the reason that the bridge in question was constructed and, until the surrender of its lease, was maintained by the railway company, and the railroad company had had no notice that it was an obstruction to the flow of water in the ditch. These three contentions of the appellants may properly be disposed of together.

Code, § 2039, provides as follows: "All the duties and liabilities imposed by law upon corporations owning or operating railways shall apply to all lessees or other persons owning or operating such railways as fully as if they were expressly named herein, and any action which may be brought or penalty enforced against any such corporation by virtue of any provisions of law may be brought or enforced against such lessees or other persons." It was the primary duty of the owner of the road to construct and maintain over the ditch a bridge that would not obstruct the passage of water, and, if it failed in either respect, it would be liable for damages occasioned by such failure. Hence, if the defendant railway company, as lessee, so constructed the bridge in question, or so maintained it, as to prevent the free flow of water down the ditch, it is liable under section 2039. The evidence is overwhelming that the girders of the bridge were so low that, when the ditch was well filled, they would catch the floating debris and dam the ditch for some distance east of the bridge. Their obstruction of the passage of the water also caused sediment to settle in the bottom of the ditch, thereby raising the same and correspondingly lessening the depth of channel. The bottom of the ditch at the bridge and east thereof had thus been raised long before the railway company surrendered its lease, and there seems no escape from the conclusion that it is liable under the statute.

As we have heretofore said, it was the duty of the owner of

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the road to construct and maintain bridges that would not obstruct the passage of water, either in a natural water course, or in a ditch authorized by law. The question then arises whether the leasing of the road, its properties, and its operation, relieves the owning company from liability for the faulty construction of bridges by its lessees, or from liability for the negligent maintenance of the same.

The appellant railroad company contends that, since the statute (section 2066) authorized the lease of its road, it is not liable for the negligent act of its lessee. But with this contention we cannot agree. An early case deciding the question before us is *Washington, Alexandria & Georgetown Railroad Company v. Catherine Brown*, 17 Wall. 445, 21 L. Ed. 675, wherein Mr. Justice Davis, speaking for the court, said: "It is the accepted doctrine in this country that a railroad corporation cannot escape the performance of any duty or obligation imposed by its charter or the general laws of the state by a voluntary surrender of its road into the hands of lessees. * * * The operation of the road by the lessees does not change the relations of the original company to the public." This rule seems to obtain generally in this country. See cases cited in 5 U. S. Dig. § 121. In 20 Am. & Eng. R. Cas. Ann. 847, the rule is laid down as follows: "A railroad company which has leased its road, cars, and engines, and allows the lessee company to operate the same, is liable to third persons or the public for the carelessness and negligence of the lessee and for defects in the construction and maintenance of the road and its equipment, unless there is a statutory provision to the contrary." A large number of cases are there cited in support of the rule thus stated, and, so far as we have examined them, they do support it. Some of the cases go to the length of holding that the lessor road is liable for injury to passengers and employees, but we need not go so far in this case. It seems to be the almost universal holding that the lessor corporation is liable for a breach of duty which it owed to the public, whether it is or is not liable for the omission of duties not falling within this classification. And it is also generally held, we think, that even where the statute authorizes the lease of a road, but contains no clause exempting the lessor from liability, the lessor still remains liable for an injury resulting from the negligent omission of a duty owed by it to the public, such as the proper construction and maintenance of its road, etc. *Lee v. Southern Pac. R. R. Co.*, 116 Cal. 97, 47 Pac. 932, 38 L. R. A. 71, 58 Am. St. Rep. 140; *Harden v. Railroad Co.*, 129 N. C. 354, 40 S. E. 184, 55 L. R. A. 784, 85 Am. St. Rep. 747, and authorities there cited. Our statute, while permitting a lease of the road, does not discharge the lessor company from any of its corporate liabilities. It merely imposes a liability on the lessee company while operating it. See *Bower v. Railroad Co.*, 42

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Iowa, 546. The lessor and lessee both being liable for the proper construction and maintenance of the bridge, there is a joint liability. *Bower v. Railroad Co.*, *supra*; *Railroad Co. v. Crane*, 113 U. S. 424, 5 Sup. Ct. 578, 28 L. Ed. 1064.

In the fourth instruction the jury was told that it was the duty of appellants to "provide passageways for the water reasonably sufficient to allow it to flow through without being diverted from its natural course or being banked up so as to cause damage to the property of another." It was further said, in the same instruction: "It must anticipate and make provision for such floods as may occur in the ordinary course of nature. It must also foresee and provide for such unusual storms as may occasionally occur, whether they are called ordinary or extraordinary; but a railroad company in building and constructing its road, bridges, and culverts is not bound to provide for unprecedented floods, nor is it guilty of negligence in failing to provide for a flood which is not only extraordinary but unprecedented and could not reasonably have been foreseen." This instruction does not in our opinion place a greater burden of care on the railroad company than the law requires. It means simply that reasonable care shall be exercised to provide bridges that will permit the free flow of the volume of water that may reasonably be expected at times, and such is undoubtedly the rule. *Houghaling v. Railroad Co.*, 117 Iowa, 540, 91 N. W. 811; *Vyse v. Railroad Co.*, 126 Iowa, 90, 101 N. W. 736; *Blunck v. Railroad Co.*, 120 N. W. 737. In requiring the railroad company to foresee and provide for such unusual storms "as may occasionally occur," the instruction required no higher degree of care than would be exercised by a reasonably careful man, and the meaning of the language was so carefully circumscribed by that part of the instruction relating to extraordinary and unprecedented floods that the jury could not have misunderstood its scope.

In the sixth instruction the court told the jury that, if it found that the flood of July 14th was not extraordinary and unprecedented, but did find that the bridge in question had not sufficient water space thereunder to accommodate the flow of water in said ditch at all times except in times of extraordinary and unprecedented floods, it would be justified in finding the defendants guilty of negligence substantially as charged. This instruction is complained of because it made no mention of the defense that the overflow in question was caused by the defective plan and construction of the ditch. The evidence would not have warranted or sustained a finding that the bridge was not itself an obstruction to the free flow of the water that might reasonably be expected to pass through the ditch at times, and, conceding that there was evidence justifying the submission of the question of the negligent plan and construction thereof, the instruction was right, because the plaintiffs were not to blame for the faults

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of the ditch, and, if the negligence of the appellants concurred with the negligence of the builders of the ditch, they were still liable for damages. *Vyse v. Railroad Co.*, *supra*; *Langhammer v. City*, 99 Iowa, 295, 68 N. W. 688. But, aside from the above consideration, the jury was told in the same instruction, in substance, that the question of the appellants' liability depended upon its determination of the other questions thereafter submitted to it, and in the seventh instruction this language was used: "If you find that the break in the levee was caused by the faulty and defective construction of the drainage ditch, or by the faulty and defective construction of the levee in question, or by the careless and improper manner in caring for and maintaining the said ditch or levee, then, in either of such events, it cannot be said that the insufficiency of the waterway at the bridge in question was the direct and proximate cause of the breaking of the levee at the point complained of, and in that event the plaintiffs cannot recover, and your verdict should be for the defendants." The same thought was again embodied in the eighth and ninth instructions with so much force and clearness that the jury could not have misunderstood the matter.

Instructions 6, 7, 8, and 9 are not, in our judgment, so misleading and inconsistent as to warrant criticism. We think they present material issues in a plain and concise manner.

There is much evidence tending to show the appellants' bridge, and that the flood in question was not an extraordinary or unprecedented one. The plaintiffs asked for damages to their growing crops of corn and hay, and the court instructed that they were entitled to their fair and reasonable market value as shown by all the facts and circumstances. The instruction gave the correct rule for this case. *Blunck v. Railroad Co.*, *supra*; *Harvey v. Railroad Co.*, 129 Iowa, 465, 105 N. W. 958, 3 L. R. A. (N. S.), 973, 113 Am. St. Rep. 483; *Sutherland on Damages*, §§ 1023-1049; *Jefferies v. Railroad Co.*, 124 N. W. 367. There was no error, therefore, in receiving testimony as to value of such crops.

Plaintiffs were permitted to amend before verdict increasing the amount of their claim. There was no error in the ruling. Nor was there error in not requiring the plaintiffs to elect which of the defendants they would pursue, nor in overruling the railroad company's motion to dismiss. Both of these points are covered by the first division of this opinion.

The original petition was in two counts. The first count asked for \$1,920 damages, and the second, which was based on the same facts, asked for \$1,920 actual damages, and for double damages in the sum of \$3,840. After the evidence was practically all in, the plaintiffs amended the prayer of the second count by asking judgment for \$2,642 actual damages, withdrawing all

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other prayers and dismissing the first count of their petition. The defendant railroad company thereupon filed a motion to strike this amendment, as we have already said, and in connection therewith, and subject thereto, it also asked that the trial be postponed "until such time as the defendant * * * many prepare a petition for removal and bond therefor," asking that the cause be removed to the federal court of Council Bluffs, Iowa. The court refused to grant the time asked, and the appellant railroad company complains thereof. The original petition was filed on the 26th day of March, 1908, and on the 14th day of April, 1908, the railroad company filed its petition and bond asking an order of removal from the district court of Iowa to the federal court of Iowa. This petition was based on the allegation that the defendant was a citizen of the state of Illinois, and that it was improperly joined with the railway company. The case was ordered removed to the Circuit Court of the United States, and was thereafter duly taken to said court, where, after a hearing, it was remanded to the district court of Iowa. There was thus an adjudication by a court with jurisdiction that the case was not removable to the federal court, notwithstanding the amount of plaintiff's claim, and hence the appellant railroad company had no right to a second order of removal nor to a postponement of the trial for the purpose of petitioning therefor. The proceedings for a removal to the federal court and the orders made therein are embodied in an amendment to the appellee's additional abstract. This amendment the appellant moves to strike. The motion is overruled. The original abstract did not present the record, and not until appellants' argument was filed did it appear to the appellee that the record would be necessary to a full understanding of the situation. The petition for removal and the orders removing the case and remanding it to the district court are part of the record of the district court which may properly be brought before this court. The verdict and judgment have ample support in the evidence, and we find no error for which there should be a reversal.

The judgment is therefore affirmed.

PORTER v. NEW YORK, N. H. & H. R. Co.

(Supreme Judicial Court of Massachusetts, Norfolk, May 17, 1910.)

[91 N. E. Rep. 875.]

Railroads—Fires—Contract for Exemption from Liability—Consideration.*—A railroad company being under no obligation to continue maintenance or operation of side tracks, its agreement to continue both is sufficient consideration for the agreement of the person for whom this was to be done that he would assume all risks to his buildings on the side tracks from sparks from the company's locomotives.

Railroads—Validity—Duress.—A railroad company having the right to discontinue the maintenance and operation of a side track for plaintiff, his agreement, in consideration of its agreement to continue their maintenance and operation, to assume the risk of sparks from its locomotives, was not obtained by duress, though the company's agent threatened plaintiff with taking out his switch and throwing him out of business if he did not make the agreement.

Exceptions from Superior Court, Norfolk County; Jabez Fox, Judge.

Action by Robert D. Porter against the New York, New Haven & Hartford Railroad Company to recover for the burning of plaintiff's coal sheds, set on fire by sparks from defendant's locomotive. Verdict was ordered for defendant, and plaintiff brings exceptions. Exceptions overruled.

The agreement relied on by defendant was one whereby it agreed to maintain and operate a side track, beginning at a connection with another side track, and running to plaintiff's coal sheds, and in consideration of which plaintiff agreed to assume all risks to buildings owned by him, and located on the side track, from fire communicated by defendant's locomotives. Plaintiff testified that before he signed the contract defendant's station agent came to him and threatened him with taking out his switch and throwing him out of business.

E. F. Leonard, for plaintiff.

Choate, Hall & Stewart, for defendant.

HAMMOND, J. These exceptions relate only to the seventh count. It is agreed that the verdict for the defendant on that

*For the authorities in this series on the question whether a railroad company may stipulate against liability for its negligence in setting fires through the operation of locomotives, see foot-note of *German-American Ins. Co. v. Southern Ry. Co. (S. Car.)*, 28 R. R. R. 611, 51 Am. & Eng. R. Cas., N. S., 611; *Hutto v. Seaboard A. L. Ry. (S. Car.)*, 32 R. R. R. 78, 55 Am. & Eng. R. Cas., N. S., 78.

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count was rightly ordered if the contract of July 28, 1897, between the parties was valid.

This contract is attacked upon the grounds of want of consideration and of duress. Upon neither ground can the attack succeed. The defendant was under no obligation, either as a common carrier or by reason of any prior contracts, to continue either the maintenance or operation of the tracks in question, and its undertaking to continue such maintenance and operation was ample consideration for the undertakings on the part of the plaintiff. The defendant, having the right to discontinue the maintenance and operation, had the right to inform the plaintiff that unless he conformed to its terms it would be obliged to do so. The action of the defendant's station agent, even if correctly stated by the plaintiff, which the defendant does not admit, falls far short of duress.

Exceptions overruled.

ALABAMA GREAT SOUTHERN R. CO. v. DEMOVILLE.

(Supreme Court of Alabama, April 20, 1910.)

[52 So. Rep. 406.]

Railroads—Fires—Property on Right of Way—Liability of Company.—If the owner of property is a mere trespasser in placing it on a railroad right of way without the company's consent, he cannot recover for its negligent destruction by fire, but, if the company licenses one to erect buildings on its right of way, it will be liable for negligently destroying them by fire, unless it has contracted for exemption from liability.

Railroads—Fires—Liability of Company—Contract for Exemption.*—Where property is placed on a railroad right of way under a contract by which the owner releases the railroad company from liability for damage to the property by fire, the company is not liable for negligently destroying the property by fire.

Railroads—Fires—Action—Admission of Evidence.—In an action against a railroad company for damages for the destruction of cotton seed stored in a building on defendant's right of way by plaintiff, claimed to have been caught from fire in a car load of cotton loaded by defendant, evidence was admissible that defendant's station agent, while superintending the loading of the cotton the day before the fire, was drunk and went into the car in which the cotton was loaded with his pipe in his mouth, though no fire was seen in the pipe and no smoke was seen coming therefrom, and that the smell of burning cotton was discovered near such cars after they

*See foot-note of preceding case.

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were loaded some ten or twelve hours before they broke into flames, leading defendant's porter to search for the fire, and that the odor was stronger where the cars were loaded than elsewhere, tending to show that the fire was negligently set out by defendant's agent, and that he was negligent in failing to discover and extinguish it.

Negligence—Evidence—Circumstantial Evidence.—Negligence need not be proved by direct and positive evidence, but may be shown by circumstances.

Railroads—Exemption Contracts—Agreements with Third Person.—An agreement between defendant railroad company and another, by which the latter agreed to save the company harmless from damage by the destruction of a seedhouse erected by it on the railroad company's right of way, in consideration of the privilege of erecting it there, would not prevent plaintiff, who was not a party thereto, and had no knowledge thereof, from recovering against the railroad company for the destruction of seed stored therein with the consent of such other, though the company was not notified that plaintiff was using the seedhouse; the agreement not binding him.

Trial—Direction of Verdict.—Where there was sufficient evidence on every count to carry all material questions to the jury, defendant's request for the general affirmative charge was properly refused.

Trial—Instructions—Province of Jury.—In an action against a railroad company for the destruction by fire of cotton seed stored in a building on defendant's right of way, claimed to have been caught from fire in a car load of cotton loaded by defendant because of the negligence of its agent in going into the car with a lighted pipe, a requested instruction that smoking a pipe while in close proximity to cotton is not negligence invaded the jury's province, and was properly refused.

Railroads—Injuries by Fire—Misleading Instruction.—The requested charge also tended to mislead the jury.

Trial—Province of Jury—Inferences from Evidence.—A charge forbidding the jury to infer legitimate and reasonable facts from facts in evidence is properly refused.

Appeal from Circuit Court, Greene County; S. H. Sprott, Judge.

Action by Albartus Demoville against the Alabama Great Southern Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

A. G. & E. D. Smith, for appellant.

Harwood & McKinley, for appellee.

MAYFIELD, J. Appellee sued appellant to recover damages for the destruction of a lot of cotton seed. The seed were destroyed by fire which was communicated to the building in which they were stored from burning cars of cotton left by defendant on its side tracks near the building. The building in which the seed

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were stored was located on the defendant's right of way, and was built by the Eagle Cotton Seed Oil Company, another corporation, under a written agreement between it and the defendant. This agreement, license, permit, or lease (whatever its name) contained a clause, or clauses, by which the Eagle Company agreed to save the defendant railroad company harmless from all damages which might arise from the destruction or injury of such building or its contents. The negligence relied upon for a recovery was in allowing the cotton in these cars to become ignited, which fire was communicated to, and destroyed, plaintiff's cotton seed. No damages were sought to be recovered for the destruction of the seedhouse in which plaintiff's seed were stored. It is agreed, and conceded, that the building belonged to the Eagle Company, and the seed therein to the plaintiff.

Plaintiff had for some seasons prior to the fire represented the Eagle Company as its purchasing agent at Boligee, and, as such agent, purchased seed for such company, storing same in this seedhouse, for shipment out over the defendant's road. However, during the season in which the fire occurred, he was not so active for the Eagle Company, but was purchasing seed on his own account; and, under an arrangement with the Eagle Company, he stored his seed in the seedhouse of the company, in consideration of which he gave the Eagle Company the refusal of purchasing the seed from him, and the seed purchased by plaintiff were so stored in this seedhouse, and some were shipped out by the plaintiff over defendant's road. Plaintiff was not shown to have had any knowledge or notice of the agreement or contract between the defendant railroad company and the Eagle Company as to the erection and maintenance of the seedhouse upon the right of way of the former further than such knowledge or notice might be implied by the fact that the seedhouse was upon the right of way of the railroad company.

The two principal questions of difference involved in the trial and on this appeal are: (1) Was any actionable negligence alleged or proven? (2) If so, was the agreement or contract between the Eagle Company and the defendant railroad company binding upon plaintiff, so as to preclude a recovery in this suit?

Many of the questions involved depend upon one or both of these two. These questions (one or both) were raised by demurrer to the complaint, by several special pleas and the demurrers thereto, and by the rulings upon the evidence, and by instructions of the court given and refused. The demurrers to the complaint were properly overruled. Each of the counts by comparison appear to be a duplicate of counts heretofore held good by this court in similar actions. Certainly, in legal effect, they are substantial duplicates of approved charges. *Marbury's Case*, 125 Ala. 237, 28 South. 438, 50 L. R. A. 620; *Clark's Case*, 136 Ala. 450, 34 South. 917; *Taylor's Case*, 129

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Ala. 238, 29 South. 673; Wilson's Case, 138 Ala. 510, 35 South. 561. It was not necessary under the averments of any one of the counts to allege wanton negligence or willful injury. Simple negligence was sufficient. Cases of injury to personalty upon the right of way of a railroad company are different from cases of personal injury to mere licensees. This is certainly true as to the negligent destruction of property by fire under circumstances such as are alleged in this complaint. Elliott on Railroads, § 1235 et seq., and Wilson's Case, *supra*.

To the complaint the defendant filed pleas of the general issue and several special pleas.

Plea 2 set up the special contract before alluded to, between the Eagle Company and the defendant company, as to the erection and maintenance of the seedhouse, containing an indemnity against loss or destruction of such house or its contents by fire or otherwise, and alleged that said contract was transferred or assigned by the Eagle Company to the plaintiff, and that plaintiff's possession of such house and the right of storage therein was by virtue of such contract or license, and that the indemnity clause of such contract was therefore binding upon plaintiff.

Pleas 3 and 4 were the same as plea 2, except that they omitted the allegation that the contract of indemnity was transferred or assigned to plaintiff, and that the cotton seed were stored thereunder; but averred that plaintiff used such seedhouse as a mere licensee, and denied any wanton or intentional wrong.

Plea A sets out the contract between the Eagle Cotton Oil Company and the defendant at length as an exhibit. It avers that the seedhouse was erected and maintained under and by virtue of said contract, and that the cotton oil company had used it continuously up to September 28, 1907; that the plaintiff, for several years prior to the fire, had stored said company's seed in said house, as the agent of said company; that on September 28, 1907, without the knowledge or consent of the defendant and its agents, the Eagle Cotton Seed Oil Company gave the plaintiff the right to use the said seedhouse for the storage of his own seed, and that plaintiff, from then to the time of the fire, did so use the said seedhouse without notice to the defendant, and without the knowledge or assent of the defendant or its agents; that the said contract between the Eagle Cotton Seed Oil Company and the defendant, except as affected by this arrangement between the plaintiff and the cotton oil company, remained in full force and effect. This plea also denied subsequent negligence.

The court sustained demurrers to all the special pleas except plea 2, to which a demurrer was overruled; and the trial was had on the general issue and upon special plea 2. The trial court correctly ruled upon these special pleas 3, 4, and A.

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The law upon the subject is, we think, correctly stated in 3 Elliott on Railroads, §§ 1235, 1236, as follows:

“Sec. 1235: Property on Right of Way.—It frequently happens that property of third persons located on the railway right of way is destroyed by fire communicated by locomotives of the company using the right of way. In cases of this kind the railway company is sometimes liable and sometimes not. The test of liability is generally whether or not the property situated on the right of way was rightfully there. If the owner of the property is a mere trespasser and placed his property on the right of way without the consent of the railway company, he cannot recover for its negligent destruction by fire. Thus, where a person intruded upon the right of way of a railway company and without the consent of the company erected a building which was afterwards destroyed by fire, it was held that there could be no recovery. But, where a company expressly licenses third persons to erect buildings within the limits of its right of way, it will be liable if it negligently destroys such buildings by fire, unless it has contracted with the persons erecting such building that it shall not be liable if the buildings are destroyed by fire. And where property is placed on the right of way of a railway company by agreement, either express or implied, and such property is negligently destroyed by fire, the company will be liable. The complaint in an action to recover damages for property burned on the right of way must show that the property was rightfully there.

“Sec. 1236. Contracts Limiting Liability.—As a general rule contracts which seek to confer upon a person immunity from the consequences of his negligent acts to be performed in the future are held void as being contrary to public policy, but there is some conflict among the authorities, and decisions may be found which support a contrary doctrine. Contracts by which railway companies attempt to excuse themselves from liability on account of negligence in the carriage of freight are almost, if not quite, universally held void. And, in the case of the carriage of gratuitous passengers, a provision in the pass on which the person rides that there shall be no liability on account of negligence of the company has been held void, although there are cases maintaining a different rule. So far as we have been able to discover, there are few cases in the books involving the validity of a contract exempting a railway from liability for negligently firing and burning property. We think that ordinarily a contract exempting the company from liability for negligently burning property not on the right of way or premises of the company would be held void. But where property is placed on a railway right of way by virtue of a contract in which the owner releases the railroad company from any and all liability on account of fire, and the property is afterwards destroyed by fire negligently set by

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the railway company, the contract is not void, and the company cannot be held liable. In such a case, as placing the property upon the right of way is an inconvenience to the company and increases the danger of fire, and as the contract in no way relieves the company from any public duty. It is not against public policy, and is therefore binding upon the parties. Where, however, a railway company leased its property and there was a provision in the lease that the company would not be liable to the lessee for property of his destroyed by fire, it was held that the company was liable to an employee of the lessee who had property which was stored on the leased premises destroyed by fire through the negligence of the railway company."

None of these pleas alleged any facts to show that this indemnity contract was binding on the plaintiff. It was not alleged that he had any knowledge or notice, actual or constructive, of such provision; nor was it alleged that his use of the seed-house was wrongful. At most, it was only alleged that he was a mere licensee of the premises. This was sufficient, under the authorities, to render the defendant liable if the seed were destroyed on account of negligence of the defendant as alleged.

Plea 2 was not proven, and hence the correctness of the verdict and judgment must depend upon whether or not any one of the counts was proven, so as to authorize the finding of the jury. It is not contended in this case that the fire was communicated by means of sparks emitted from defendant's engines, nor was there any evidence tending to support such a theory. It is, however, clearly shown that plaintiff's property was burned, and that the fire was communicated to the building in which it was stored from some box cars which were loaded with cotton in bales, which cars were placed on a side track near plaintiff's property. It is also reasonably certain from the evidence that the fire originated in these bales of cotton thus stored in these cars. This cotton was loaded onto these cars by defendant's agents on the day preceding the destruction of plaintiff's property, which occurred about 2 o'clock a. m. After the cotton was thus loaded onto these cars, the cars were sealed, being closed ones; and hence it is not probable that sparks could have been communicated to the cotton after the cars were thus sealed.

The plaintiff offered, and had admitted, over the objection and exception of the defendant, evidence that defendant's depot agent at Boligee, while aiding in or superintending the loading of the cotton onto these cars on the day preceding the fire, was drunk or intoxicated, went amongst the bales of cotton, and into the car in which the cotton was loaded, and after it was loaded, with his pipe in his mouth, and that the odor of burning cotton was detected near these cars soon after they were so loaded and sealed, and that defendant's porter was caused to thereby search for the fire or burning cotton, and that the odor of the burning

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cotton was stronger at the depot, where these cars were located, than elsewhere. These were all circumstances tending to show that the fire was set out by defendant's agents, and that it was negligently set out, and that defendant's agents were guilty of negligence in failing to discover the fire in time to extinguish it, and to thus prevent the damage to plaintiff by the spreading of the fire to his property 12 or 14 hours thereafter. This evidence certainly tended to show that the bales of cotton caught on fire while they were being loaded, and before the cars were sealed; or that they were on fire when so loaded, and that the defendant's agents were guilty of actionable negligence in so setting the cotton on fire, or in failing to discover that it was on fire when loaded and before the cars were sealed, and in failing to discover the fire after the cars were loaded. This was the only probable theory as to the origin of the fire. The fire smoldered in these bales of cotton for 12 or 14 hours. Then, kindling into flames and bursting or burning through the cars, it was communicated to plaintiff's property at about 2 o'clock of the morning following the afternoon on which cotton was loaded. And the drunken condition of defendant's agent, together with the fact that he had a pipe in his mouth at the time he was handling the cotton or superintending the loading of same on the cars, was a circumstance tending to show the negligence complained of, resulting in plaintiff's damage. True, the witnesses who testified to his having the pipe in his mouth did not see any fire in the pipe, nor any smoke from the pipe or from the agent's mouth; but the failure to show that fire was in the pipe did not render the evidence inadmissible.

Had it been shown that there was fire in the pipe, and that smoke and sparks were being emitted from it, the evidence would have been much more convincing to show negligence; but the failure to show any one of these additional evidentiary facts did not render the fact that the agent was drunk at the time of the loading of the cotton and had a pipe in his mouth when handling the cotton inadmissible. It was open to the jury to infer that fire was in the pipe at the time in question, and that it was communicated to the cotton, and that it was so communicated by reason of the drunken condition of defendant's agent who was handling it, and that such acts were actionable negligence as alleged. It was likewise open to the jury to infer from this and other evidence in the case that but for the drunken condition of this agent while handling the cotton, and but for the fact that he had a pipe while drunk and while so handling the cotton, the fire would not have occurred; and that, if it did so occur on this account, it was actionable negligence. It was likewise open for the jury to infer that but for the drunken condition of this agent the fire would have been discovered sooner, and the spreading to plaintiff's property have been prevented. But

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for the drunken condition of this agent the fire might have been discovered when the odor of burning cotton was detected—which was eight or ten hours before the fire broke out. It was open to the jury to infer this from all the evidence, and also to infer that the fire was at that time smoldering in the bales of cotton, and that a reasonable inspection of the cars or premises would have discovered the fire, and thus admitted of its being extinguished, to the preservation of plaintiff's property. If the fire did not originate and occur on account of the negligence of the defendant's agent in the manner in which the evidence of plaintiff tended to establish, it is difficult to conceive any reasonable cause. This evidence, in connection with other undisputed facts in the case, we think authorized the inference that the fire originated or spread on account of the actionable negligence of defendant's agent, and that the defendant was answerable for such negligence of its agent.

While the fact that the agent was drunk when the cotton was being loaded into the car or the fact that he had a pipe in his mouth while he was working with the cotton, or the fact that the odor of burning cotton was detected soon after these acts of the agent, and eight or ten hours before the fire broke out of the cars and was communicated to plaintiff's property, standing alone, would not be sufficient to justify the verdict against the defendant, yet each circumstance was competent and admissible, and, when all are considered together and in connection with all the other evidence, we are not prepared to say that the evidence was insufficient to support the verdict. The fire occurring in the nighttime, as it did, and originating among the bales of cotton, closed as they were in the car, the evidence to prove how the cotton was first ignited would almost of necessity depend upon circumstantial evidence. This court has several times held that evidence may be sufficient to prove the origin of the fire and the negligence of the defendant in setting it out. *Johnston's Case*, 128 Ala. 283, 29 South. 771; *Malone's Case*, 109 Ala. 509, 20 South. 33; *Elliott on Railroads*, § 1243. The court having limited the evidence as to the drunkenness of the agent and his having a pipe in his mouth to the time during which he was engaged in handling and loading the cotton which caught on fire, there was clearly no error in its admission. *Wigmore on Ev.* § 85, and notes. The rule is thus stated in 1 *Shearman & Redfield on Negligence*, § 58: "The plaintiff is not bound to prove more than enough to raise a fair presumption of negligence on the part of the defendant and of resulting injury to himself. Having done this, he is entitled to recover, unless the defendant produces evidence sufficient to rebut this presumption. It has sometimes been held not sufficient for the plaintiff to establish a probability of the defendant's fault; but this is going too far. If the facts proved make it probable that the defendant violated his duty, it

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is for the jury to decide whether he did so or not. To hold otherwise would be to deny the value of circumstantial evidence. As already stated, the plaintiff is not bound to prove his case beyond a reasonable doubt; and, although the facts shown must be more consistent with the negligence of the defendant than with the absence of it, they need not be inconsistent with any other hypothesis. It is well settled that evidence of negligence need not be direct and positive. Circumstantial evidence is sufficient. In the nature of the case the plaintiff must labor under difficulties in proving the fact of negligence; and, as that fact itself is always a relative one, it is susceptible of proof by evidence of circumstances bearing more or less directly upon the fact of negligence, a kind of evidence which might not be satisfactory in other classes of cases, open to clearer proof. This is on the general principle of the law of evidence, which holds that to be sufficient or satisfactory evidence which satisfies an unprejudiced mind. Proof that similar accidents do not happen from similar things, when properly managed, is competent to raise a presumption of negligence, where an accident has happened."

It may be true, as contended by appellant, that the burden of proof and the presumptions of negligence are somewhat different in cases in which property is fired directly by sparks emitted from engines from cases like the one under consideration, in which the fire spread from other property on fire upon the right of way of the railroad company. Elliott on Railroads, § 1242, contains the following statement of the rules in the two cases: "Where a fire is caused by inflammable material on the right of way or by fire spreading from the right of way, the authorities are pretty well agreed that the burden of proving negligence rests upon the plaintiff. In such cases, it is but just that the burden should rest upon the plaintiff, for the means of proof are as equally available to the plaintiff as to the defendant. The gist of such action in such cases is negligence in suffering the fire to escape, and the burden in showing negligence in that respect rests upon the plaintiff. But where a fire is set directly by sparks from a locomotive, and the action is predicated on negligence of the company in using a locomotive with defective apparatus or equipments or in negligently and unskillfully managing a locomotive, the authorities are in direct conflict as to who has the burden of proof." Shearman & Redfield on Negligence, § 676, states the rule as to the burden of proof as follows: "The decided weight of authority and of reason is in favor of holding that, the origin of the fire being fixed upon the railroad company, it is presumptively chargeable with negligence, and must assume the burden of proving that it had used all those precautions for confining sparks or cinders (as the case may be), which have been already mentioned as necessary. This is the common law of England, and the same rule has been followed in the federal courts and in the state

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courts. * * *” The evidence in this case having conclusively shown that the fire originated in the box car loaded with cotton, which was on defendant’s right of way and side track, and that it was not probable that it was fired by any other means than the negligence of defendant’s agents, and there being sufficient circumstantial evidence from which the jury could infer such negligence on the part of defendant’s agent, we hold that there was sufficient evidence to carry the case to the jury and to support the verdict rendered. It is matter of common knowledge that fire in bales of cotton which are well packed burns very slowly, and that it may so burn for a long time before blazing, and that, while so burning, it gives out an odor like that of rags or cloth burning, and that fire in bales of cotton may be detected by this odor long before there is any other evidence of the fire, unless it should be small quantities of smoke. The evidence, therefore, that this odor was detected and the attention of defendant’s agents called to it was admissible, though this happened eight or ten hours before the cotton in the cars blazed up, or was discovered by the plaintiff.

The contract or agreement between the defendant and the Eagle Company, by which the latter agreed to indemnify the former, or to save it harmless against all damages on account of the destruction of the seedhouse or its contents, in consideration of the privilege of erecting such house on defendant’s right of way, was not relevant or material evidence on this trial. It was not shown that plaintiff was a party or privy to the contract, and it was shown that he had no knowledge or notice of it prior to the loss sustained. The mere fact that he had the permission or consent of the Eagle Company to store his seed in the house did not render him liable to the provisions of that contract. The contract on its face did not purport to bind the plaintiff or any one except the parties to it, and plaintiff was conclusively shown not to have had any knowledge or notice thereof. The mere facts that the house was on the right of way of the defendant, and that plaintiff had placed his seed therein without the knowledge or consent of the defendant, did not and could not defeat or prevent plaintiff’s right of action, if it otherwise existed. Plaintiff was shown to have obtained the consent to so store his seed from the proper party—the Eagle Company. It was not shown that defendant had ever attempted to control the use to which the building should be put. Moreover, it is shown that it was being used for the express purpose for which it was built. It could be no defense of justification in this action that the seedhouse was erected and maintained on defendant’s right of way under the contract in question. As before stated, the plaintiff was not a party or privy to it, and was not bound by it. It was not necessary for the plaintiff to show that the Eagle Company had noti-

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fied defendant of his use of this property. The contract did not so provide; and, had it done so, it was shown that plaintiff had no knowledge or notice of the contract.

All the charges which were in effect the general affirmative charge for defendant, as to any one or more of the counts, were properly refused for the reasons that there was sufficient evidence to carry all material questions to the jury as to each count, and that the defendant had failed to prove its special plea numbered 2.

Charge 7 was properly refused. The fact that plaintiff used the seedhouse as a licensee of the defendant if the jury had or could have so found would not have authorized a verdict for defendant. The charge in effect was that, if plaintiff was so occupying the seedhouse, he could not recover. As we have shown above, this is not the law.

It was not necessary for plaintiff to have had the permission of the defendant to so use the seedhouse in question, in order to render the defendant liable; nor was the fact that he so used it without defendant's knowledge or consent a bar to his right to recover, if otherwise he was entitled to recover. For this reason, charge 8 was properly refused.

Charge 11 assumes as matter of law that smoking a pipe while in close proximity to cotton is not negligence. It might or might not be, depending upon other attending circumstances. The charge invaded the province of the jury, and had a tendency to mislead them, and for these reasons was properly refused. A charge which denies to the jury the right to infer legitimate and reasonable facts from other facts proven is properly refused. It was, as we have before stated, a question for the jury to say whether or not the smoking of a pipe under the circumstances was negligence.

Finding no error in the record, the judgment must be affirmed. Affirmed.

DOWDELL, C. J., and ANDERSON and SAYRE, JJ., concur.

MILLER-BRENT LUMBER CO. v. DOUGLAS *et al.*

(Supreme Court of Alabama, April 21, 1910.)

[52 So. Rep. 414.]

Railroads—Fires—Burden of Proof.*—Where fire is communicated to property from an operated locomotive, the burden is on defendant to show *prima facie* that the fire was thus communicated without negligence of defendant in the construction, equipment, or operation of the locomotive.

Evidence—"Inference"—"Supposition."—"Inference," in legal parlance, as respects evidence, is a very different thing from "supposition." The former is a deduction from proven facts, while the latter requires no such premise for its justification. Courts and juries, in dealing with the inquiry whether a party has discharged his burden of proof, cannot pronounce on mere supposition that the burden has been met, but can only establish the ultimate fact from others justifying such inference (citing *Words & Phrases*, vol. 4, p. 3579; vol. 8, p. 6807).

Railroads—Fires—Burden of Proof.*—In an action for the destruction of property by fire alleged to have been communicated by the operation of a locomotive, the burden was on defendant to exclude *prima facie* the three means, namely, negligent construction, equipment, and operation, by which the fire could have been negligently communicated to the property.

Railroads—Fires—Question for Jury.—In an action for the destruction of property alleged to have been caused by a fire communicated by defendant's locomotive, evidence that 20 or 30 minutes after a locomotive that might have emitted sparks passed a building of undefined distance from the track, on a day when the wind condition was not shown, the building was discovered to be on fire, on its roof, on the side next the track, was insufficient to require submission to the jury of the question whether the locomotive set fire to the building.

Appeal from Circuit Court, Coffee County; H. A. Pearce, Judge.

*For the authorities in this series on the question whether a presumption of negligence on the part of the railroad arises from the fact that a fire is set by a locomotive, see *Norfolk & W. Ry. Co. v. Thomas* (Va.), 34 R. R. R. 618, 57 Am. & Eng. R. Cas., N. S., 618; first foot-note of *Goodman v. Lehigh Valley R. Co.* (N. J.), 34 R. R. R. 383, 57 Am. & Eng. R. Cas., N. S., 383; *Erickson v. Pennsylvania R. Co.* (C. C. A.), 33 R. R. R. 526, 53 Am. & Eng. R. Cas., N. S., 526.

For the authorities in this series on the subject of the rebuttal of the presumption of negligence arising from the fact that a fire was started from sparks from a locomotive, see second foot-note of *Philips v. Southern Ry. Co.* (Va.), 34 R. R. R. 394, 57 Am. & Eng. R. Cas., N. S., 394.

Miller-Brent Lumber Co. v. Douglas

Action by A. S. Douglas and another against the Miller-Brent Lumber Company. Judgment for plaintiffs, and defendant appeals. Reversed and remanded.

W. O. Mulkey and J. F. Sanders, for appellant.

John H. Wilkerson and Claude Riley, for appellees.

MCCLELLAN, J. Action, by appellee against appellant, for loss of property, by fire alleged to have been negligently communicated to a depot of the Louisville & Nashville Railroad Company, where it was for shipment, by a locomotive operated by appellant over the track of the Louisville & Nashville Railroad Company.

It is settled with us, by repeated decision, that, where fire is communicated to property from an operated locomotive, the burden of proof is upon the defendant to show, *prima facie*, that the fire was thus communicated without negligence of the defendant in the construction, equipment, or operation of the locomotive. *L. & N. R. R. v. Reese*, 85 Ala. 497, 5 South. 283, 7 Am. St. Rep. 66; *Sullivan Co. v. L. & N. R. R. Co.*, 50 South. 941; *L. & N. R. R. Co. v. Sherrill*, 152 Ala. 213, 44 South. 631 (treating charge 5, among others).

It was admitted, on the trial below, that the engine in this instance charged to have communicated the fire "was not equipped with proper spark arrester."

If the fire was communicated to the roof of the Louisville & Nashville Depot, at Pink, Ala., the defendant did not discharge the burden of proof resting on it to show, *prima facie*, that the fire's communication was not the result of its negligence. In such case, where the communication of the fire is shown, positively or circumstantially, the obligation is on the defendant to exclude, *prima facie*, the three means, viz., construction, equipment, and operation, by which the fire may have been negligently communicated to the property. So that, in this case, the chief question is: Was the fire, destroying appellee's property, communicated by defendant's locomotive?

When taken with the utmost favor for appellee, the evidence in this record is not sufficient, even circumstantially, to have required the submission of the stated inquiry to the jury. It was shown that "no one saw any sparks being emitted or thrown from the engine (defendant's) on this occasion." The evidence was in conflict on the issue whether steam was being "worked" when this engine passed the depot. If the engine was not under steam, all the witnesses testify that the emission of sparks was impossible; and, on the contrary, it seems to have been the theory that, if the engine was under steam, sparks might be emitted.

It may be granted that sparks may be emitted by an engine under steam; yet that, as is obvious, is, alone, far short of affording

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evidence, even inferentially, that in fact sparks were emitted. The possibility that a thing may occur is not alone, under any fair, reasonable deduction, evidence, even circumstantial, that the thing did, in fact, occur.

But it is insisted that the possibility stated is not the sole evidence of the asserted fact, viz., that sparks emitted from the engine ignited the roof of the depot. The supplementary evidence to support the asserted fact is said to be present in the evidence that the depot was discovered to be on fire, on the roof, on the side next the railroad, 20 or 30 minutes after this engine passed, and that a trash heap, about 15 feet from the track and north of the depot, was also discovered to be on fire a few minutes before the depot was discovered to be on fire, and that the trash pile was not on fire before the defendant's train passed, "nor was there any person standing near the trash pile from the time the train passed and until it was discovered to be on fire."

The cause of a known effect may be often ascertained, with reasonable certainty, by excluding other causes that may have produced the known effect; whereas, if such other causes are not excluded, the effect is ascribable, in point of fact, to many causes, and is, hence, incapable, for practical purposes of ascertainment, of definite ascription to any one cause. Such indefiniteness cannot lead to the certainty requisite to discharge a burden, in proof, to designate the cause. While not of course in immediate point, this underlying principle led the court to hold, in *Tinney v. Central of Georgia Ry. Co.*, 129 Ala. 523, 30 South. 623, that the presumption of negligence, in construction, equipment, or operation of an engine setting out fire, would not avail a plaintiff where his complaint omitted, in averment of negligence, one of the three presumptively negligent causes for the ignition of plaintiff's property by fire. Or, to state it otherwise, that the presumption, arising from property destroyed by fire set out by a locomotive, would not refer the cause thereof to those charged, in the pleading, and omit its reference to a negligent cause not counted on in the complaint. The principle, though not here, as there, involving presumption, but inference only, must lead to the conclusion, on the inquiry of fact with which we are here concerned, that the plaintiff does not discharge his burden, in the absence of positive evidence of the fact asserted, unless the reasonably possible causes of the fire destroying his property are winnowed, at least by tendencies of the evidence, to that for which (if negligence) the defendant is responsible. Inference, in legal parlance, as respects evidence, is a very different matter from supposition. The former is a deduction from proven facts (4 Words & Phrases, p. 3579); while the latter requires no such premise for its justification (8 Words & Phrases, p. 6807). And the courts and juries, in dealing with the inquiry whether a

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party has discharged his burden of proof, cannot pronounce upon mere supposition that the burden has been met.

In this case, circumstantial at best, we find no evidence tending to exclude the reasonable possibility that the roof of the building was ignited by, for instance, fire within or about the building. There is no evidence of the direction of the wind (if such there was) on the occasion, whether toward (from the track) the building or not. There is no evidence of the distance of the building from the track. The trash pile, we may assume for the argument only, was set by this engine. The evidence shows that to have been 15 feet from the track—whether on the same side as the depot does not appear—and 100 yards north of the depot. In the absence of evidence tending to show the distance of the depot from the track, and of evidence that the trash pile was ignited by sparks from the engine's smokestack, and of evidence tending to show the relative location of the trash pile to the depot, whether on the same side of the track, it is obvious that the firing of the trash pile could not avail as evidence, affording inference even, that the roof of the building was set on fire by sparks emitted as the result of the action of applied steam producing "exhaust" of the engine—a theory to which the plaintiff committed the success of his cause. The trash pile may have been ignited by fire from beneath the engine, from its fire box; and, if so, the plaintiff's stated theory could get no support from the fact that the trash pile was ignited by fire from that part of the engine.

The case, then, is simply this: Twenty or 30 minutes after a locomotive, that might have emitted sparks, passes a building of undefined distance from the track, on a day when the wind conditions are not shown, the building is discovered to be on fire, on its roof, on the side next the track. We feel assured that such evidence was insufficient to require the submission of the inquiry to the jury whether the locomotive in question set fire to the building.

This court has dealt often with the inquiry here presented. It is not, of course, the same question that arises where the issue is negligence *vel non* in setting out a fire shown, positively or circumstantially, to have been set out by a locomotive. In most of the cases (the Malone Case, 109 Ala. 509, 20 South. 33, and Sherrill's Case, 148 Ala. 1, 44 South. 153, and Louisville & N. R. Co. v. Sherrill, 152 Ala. 213, 44 South. 631, being instances) there was some evidence tending to show emission of sparks, by the engine, at or about the place where the fire started; also, the relative location of the point of inception of the fire; and, also, evidence tending to warrant the inference, from circumstances it may be, that the fire had its inception in no other reasonably possible cause than the locomotive. Our numerous other decisions, bearing on the inquiry, are readily accessible. It is

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unnecessary to undertake their review, or to assume here to lay down any rule that must be conformed to in order to afford evidence justifying the inference that a fire was set by a locomotive. Counsel for both litigants cite and rely upon the recent decision of *Southern Railway Co. v. Dickens*, 49 South. 766. The facts and circumstances there reviewed, and on review of which the judgment below was affirmed, readily distinguish that case from this. A notable difference is that one witness testified that the engine in question set out the fire. It was ruled, aside from the discussion *arguendo*, that the inquiry whether that engine set out the fire was properly submitted to the jury's determination.

The affirmative charge, requested by defendant, was due it on the evidence in the record before us. For its refusal, the judgment must be reversed, and the cause remanded.

Reversed and remanded.

DOWDELL, C. J., and ANDERSON and SAYRE, JJ., concur.

DEPPE v. ATLANTIC COAST LINE R. CO.

(Supreme Court of North Carolina, March 9, 1910.)

[67 S. E. Rep. 262.]

Appeal and Error—Review—Motion for Judgment.—Where a case is presented to the Supreme Court on appeal from the granting of defendant's motion for judgment under the statute at the conclusion of plaintiff's evidence, the evidence must be construed in the view most favorable to plaintiff, and every fact which it tends to prove and which is an essential ingredient of the cause of action must be established, as the jury, if the case had been submitted to them, might have found those facts from the testimony.

Railroads—Action for Injuries by Fire—Question for Jury.—Evidence held to present a question for the jury whether defendant railroad company's engine was the origin of the fire adjoining its right of way which destroyed plaintiff's property.

Railroads—Action for Injuries—Origin of Fire—Determination.—In considering the origin of a fire in an action against a railroad company for injuries therefrom, it is immaterial whether it started on or off its right of way.

Railroads—Actions for Injuries by Fire—Presumptions and Burden of Proof.*—The origin of a fire being fixed on a railroad company, it is presumptively chargeable with negligence, and has the burden of proving it used all necessary precautions for confining sparks or cinders.

*See first foot-note of preceding case.

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Railroads—Injuries by Fire—Care to Prevent.†—A railroad company was not negligent as to a fire destroying property not on its right of way, originating from sparks or cinders, if it used, by a competent and skilled engineer, in a careful way, all the precautions approved and in general use for confining the same.

Appeal from Superior Court, Craven County; Guion, Judge.

Action by N. R. Deppe against the Atlantic Coast Line Railroad Company. From a judgment for defendant, plaintiff appeals. Reversed.

D. L. Ward and D. E. Henderson, for appellant.
Moore & Dunn, for appellee.

MANNING, J. This case being presented to us upon motion for judgment, under the statute, made by the defendant at the conclusion of plaintiff's evidence, the rule established by this court, for the consideration of the evidence, is thus stated: "The evidence must be construed in the view most favorable to the plaintiff, and every fact which it tends to prove and which is an essential ingredient of the cause of action must be established, as the jury, if the case had been submitted to them, might have found those facts from the testimony." *Cotton v. Railroad*, 149 N. C. 227, 62 S. E. 1093; *Brittain v. Westhall*, 135 N. C. 492, 47 S. E. 616; *Freeman v. Brown*, 151 N. C. 111, 65 S. E. 743. The plaintiff sues to recover damages for the negligent destruction by fire of two dry kilns, a large lot of lumber, and a sawmill plant and appurtenances, located at Deppe, in Onslow county, and near a track of the defendant. The fire occurred on the morning of August 15, 1908. A freight train operated by the defendant stopped on that morning at Deppe, and the engine was for 15 or 20 minutes shifting cars backwards and forwards on the side track running to plaintiff's plant. The kilns were built near the side track—60 feet from it. They lay lengthwise along the track, and in the green end of the kiln—i. e., the end through which the trucks full of lumber are run into the kiln, at the top—there was a ventilator 4 or 4½ by 8 feet, opening back about 6 or 7 feet high. The kilns were each about 20 feet wide, and were used for drying out lumber. They were heated by steam conducted in iron pipes from a boiler 156 feet away. The pipes, after reaching the kilns, were laid on iron pipes in the bottom of the kilns, and the ventilators were used for the discharge of the

†As to the care required of a railroad in furnishing spark arresters, see fifth foot-note of *Ides v. Boston & M. R. R.* (Vt.), 33 R. R. R. 282, 56 Am. & Eng. R. Cas., N. S., 282.

For the authorities in this series on the subject of the effect of the exercise by defendant of due care in furnishing and operating locomotives, see second foot-note of *Chesapeake & O. R. Co. v. Richardson* (Ky.), 26 R. R. R. 506, 49 Am. & Eng. R. Cas., N. S., 506.

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hot air moistened by the water from the lumber. The kilns were tightly built, and no fire was in or about them. From the iron pipes to the place where the fire was discovered in the top of the kilns was 12 to 14 feet. When the fire was discovered near the top of the kiln and near the ventilator, between the ceiling and the roof, no fire was discovered around the pipes or near them than the ventilator. The ventilators were open. The wind was blowing from the railroad track towards the kilns, and they were enveloped in the black smoke of the shifting engine while there. The boiler, which furnished the steam heat to the kiln, was 156 feet away from the kiln, and the wind was blowing its smoke and cinders from its smokestack away from the kilns. Only one of the two kilns was heated the morning of the fire. The mill was idle and no fire in its boiler. It was in evidence that it was impossible for the fire occurring in the part of the kiln where it was when first seen to have been caused by the steam-heated pipes. The time between the departure of the defendant's train and the breaking out of the fire was estimated by the witnesses to have been from three-fourths of an hour to an hour and three-fourths. Some of them described it as a short time. The witnesses explained in detail the construction of the kilns, the location in them of the steam pipes, and a map of the premises was used, showing the relative location and distances of the sawmill, lumber sheds, kilns, boiler, and railroad tracks.

The first question, therefore, presented is: "Was the defendant's engine the origin of the fire?" Does the evidence, construed in the view most favorable to the plaintiff, tend to prove this primal fact? The defendant contends that no witness testified that he saw sparks emitted by the engine, or that he saw the sparks from the defendant's engine ignite the plaintiff's lumber kiln. In considering this contention, it must be remembered that this fire occurred in the daytime—in the brilliancy of a summer sun—rendering sparks emitted by an engine incapable of being seen by the human eye. That no one saw the sparks ignite the burned property was the fact in *McMillan v. Railroad Co.*, 126 N. C. 725, 36 S. E. 129, and *Williams v. Railroad*, 140 N. C. 623, 53 S. E. 448, in which latter case this courts comments upon a similar contention: "No one testified that he saw the sparks fall from the engine upon the right of way. It is rarely that this can be shown by eyewitnesses, for it would be put out by the observer. But here the fire was seen on the right of way. It burnt along the track between the ditch and the ends of the ties, and thence had gone into the woods. The wind was blowing from the northwest across the track; the fire being on the south side. Two witnesses testified that they first saw the smoke about 30 minutes after the defendant's engine passed. How long before that the fire began no one knew, but there was no fire before

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the engine passed. The other witnesses first saw the fire after a longer interval, and there was evidence the fire burnt both ways. These were matters for the jury." The evidence offered in the present case tends to fix the origin of the fire upon the defendant's engine by exclusion of every other known cause. There was no fire before the defendant's engine began shifting cars on the track. There was no fire about the kiln or within 156 feet, more than twice the distance of defendant's engine. Smoke from the engine entirely enveloped the kiln. The only opening in the kiln was the ventilator—the place at which, or near which, the fire was discovered. It was impossible for the fire to have originated from the steam pipes. The wind was blowing the smoke from plaintiff's boiler away from the kiln, and was blowing the dense smoke from defendant's engine on the kiln, until it was enveloped. We think the evidence ought to have been submitted to the jury, as the triers of the fact, to determine the primal fact—if the defendant's engine was the cause of the fire. As the evidence tended to prove this fact, we must, for the purposes of this motion, assume that this fact was established, and that the jury would have so found. In considering the origin of the fire, it is immaterial whether the fire caught on or off the right of way. The place of ignition is important on the second question.

The second question presented is: Could the jury find from this primal fact that the plaintiff's property was negligently burned by the defendant? In 2 Sher. & Redf. on Negligence, § 676, the learned authors say: "The decided weight of authority and of reason is in favor of holding that, the origin of the fire being fixed upon the railroad company, it is presumptively chargeable with negligence, and must assume the burden of proving that it had used all those precautions for confining sparks or cinders (as the case may be) which have already been mentioned, as necessary. This is the common law of England, and the same rule has been followed in New York, Maryland, North Carolina, South Carolina, Illinois, Wisconsin, Missouri, Nebraska, and Texas." *Ellis v. Railroad Co.*, 24 N. C. 138; *Manufacturing Co. v. Railroad*, 122 N. C. 881, 29 S. E. 575; *Hosiery Co. v. Railroad*, 131 N. C. 238, 42 S. E. 602; *Lumber Co. v. Railroad*, 143 N. C. 324, 55 S. E. 781. If the defendant can show at the trial that it "had used all those precautions for confining sparks or cinders," which are approved and in general use, and the jury shall so find the fact, the trial judge will instruct them to answer the issue of negligence "No," provided the precautions were used by a competent and skilled engineer in a careful way. Rule 1 in *Williams v. Railroad*, 140 N. C. 623, 53 S. E. 448; *Knott v. Railroad*, 142 N. C. 238, 55 S. E. 150. In this case we assume the kilns were not on the right of way of defendant, and it would

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seem that the case falls under rule 1 of the summary of the rules of negligence, stated with such clearness by the chief justice in *Williams v. Railroad*, 140 N. C. 623, 53 S. E. 448.

We therefore think his honor erred in sustaining the motion to nonsuit, and this judgment is reversed, and there will be a new trial.

BELLE ALLIANCE CO., Limited, v. TEXAS & P. RY. CO.

In re TEXAS & P. RY. CO.

(Supreme Court of Louisiana, March 14, 1910.)

[51 So. Rep. 846.]

(Syllabus by Editorial Staff.)

Negligence—Comparative Negligence.—The doctrine of comparative negligence does not obtain in Louisiana.

Negligence—Contributory Negligence.*—One cannot recover for injuries caused by the negligence of another, if his own negligence was to some extent the proximate cause of the result complained of.

Railroads—Crossing Accidents—Last Clear Chance—Application of Doctrine.†—The last clear chance doctrine, as applied to railway crossing accidents, is that if, after the engineer has seen the danger of the person on or near the track, he can stop his engine and avert the accident, and fails to do so, the person injured can recover in spite of his own negligence.

Action by the Belle Alliance Company against the Texas & Pacific Railway Company. From a judgment for plaintiff, affirmed by the Court of Appeal, defendant brings writ of review. Judgment reversed, and suit dismissed.

E. W. Pugh, for plaintiff.

Howe, Fenner, Spencer & Cocke and *Marks, Wortham & Le Blanc*, for defendant.

PROVOSTY, J. This case is here on writ of review to the Court of Appeal. The plaintiff sues in damages for the value of three mules killed in a collision between a wagon of the plaintiff company, drawn by the three mules, and a locomotive of the de-

*See first foot-note of *Evansville & T. H. R. Co. v. Berndt* (Ind.), 34 R. R. R. 535, 57 Am. & Eng. R. Cas., N. S., 535.

†For the authorities in this series on the subject of the last clear chance doctrine, see last foot-note of *Powers v. Des Moines City Ry. Co.* (Iowa), 34 R. R. R. 597, 57 Am. & Eng. R. Cas., N. S., 597; first foot-note of *Bonnett v. Chicago & N. W. Ry. Co.* (Iowa), 34 R. R. R. 284, 57 Am. & Eng. R. Cas., N. S., 284; fourth foot-note of *Norfolk & P. T. Co. v. Forrest's Adm'x* (Va.), 33 R. R. R. 472, 56 Am. & Eng. R. Cas., N. S., 472.

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fendant company. The road along which the wagon was being driven crossed the railroad at right angles, and the two vehicles, as they approached the point of collision were masked from each other by a building. The plaintiff alleges negligence on the part of the defendant; and one of the defenses is that of contributory negligence on the part of the plaintiff. The district court and the Court of Appeal agreed in finding that both the driver of the wagon and the engineer of the locomotive had been negligent, but found a greater degree of negligence, or more culpable negligence, on the part of the railroad, and so condemned it in damages, following, as was supposed, the decision of this court in the case of *Ortolano v. Morgan's Louisiana & Texas R. R. Co.*, 109 La. 912, 33 South. 914.

In that case the injury was to a child five years old, incapable of contributory negligence, which had gone on the track without imputable negligence to its parents. Plainly in that case there was an absence of contributory negligence.

Our Brethren have applied the doctrine of comparative negligence, which never obtained, except in a few states, Illinois, Kansas, Tennessee, and Georgia, and has been repudiated in those (*Barrows on Negligence*, p. 79; *A. & E. E. of L.* vol. 6, p. 360), and has never obtained in this state (*Wilkinson on Personal Injuries*, p. 64, § 65).

The true doctrine, for which no citation of authority can be necessary, is that plaintiff cannot recover for injuries caused by the negligence of defendant, if his own negligence was to some extent the proximate cause of the result complained of.

The one recognized exception to that rule is what is known as the last clear chance doctrine, which, as applied to accidents at railway crossings, is that if, after the engineer has seen the danger of the person on or near the track, he can stop his engine and avert the accident, and fails to do so, the person injured can recover, in spite of his own negligence. That exception can have no application in this case, and it is not pretended that it has.

The judgments of the Court of Appeal and of the district court are set aside, and the suit of the plaintiff is dismissed, with costs.

SOUTHERN RAILWAY COMPANY, Petitioner, *v.* JOSEPHINE KING.
SOUTHERN RAILWAY COMPANY, Petitioner, *v.* INEZ KING,
by Her Next Friend, Mrs. Josephine King.

(Argued April 6, 7, 1910. Decided May 16, 1910.)

[30 Sup. Ct. Rep. 594.]

Commerce—Railroad Crossings.*—A state may regulate, at least, in the absence of congressional action upon the same subject-matter, the manner in which interstate trains shall approach dangerous crossings, the signals which shall be given, and the control of the trains which shall be required under such circumstances.

Pleading—Sufficiency of Answer.—General averments in an amended answer in an action to recover damages from a railway company for a wrongful death caused by violation of Ga. Civ. Code, § 2222, requiring the slackening of speed at highway crossings, that such statute violates the commerce clause, and is a direct burden upon and impedes traffic, and impairs the usefulness of the railway company's facilities for that purpose, and that it is impossible to observe the statute in carrying mails and in interstate commerce business, are not sufficient as against demurrer, since they are mere conclusions, and do not show the number or location of the crossings at which the railway company will be required to check the speed of its trains, nor that the particular crossing is not a dangerous one.

On writs of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit to review judgments which affirmed judgments of the Circuit Court for the Eastern Division of the Northern District of Georgia, in favor of plaintiffs in an action to recover damages from a railway company for a wrongful death caused by failure to observe a state statute requiring the slackening of speed at highway crossings. Affirmed.

See same case below, 87 C. C. A. 284, 160 Fed. 332.

The facts are stated in the opinion.

Messrs. John J. Strickland, Alfred P. Thom, Hamilton McWhorter, and McDaniel, Alston, & Black for petitioner.

Mr. Reuben R. Arnold for respondents.

MR. JUSTICE DAY delivered the opinion of the court:

These cases were tried together in the circuit court, and were so considered in the circuit court of appeals, and will be so disposed of here. In No. 140, Josephine King brought her suit in the superior court of Habersham county, Georgia, to recover

*For the authorities in this series on the subject of the right of a state to regulate or interfere with interstate commerce, see last foot-note of *Hockfield v. Southern Ry. Co. (N. Car.)*, 34 R. R. R. 492, 57 Am. & Eng. R. Cas., N. S., 492.

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\$10,000 against the Southern Railway Company for the wrongful death of her husband, killed while riding in a buggy, at a crossing of the defendant's railway. The alleged negligence was the violation of a certain statute of the state of Georgia, in that the company failed to check and to keep checking the speed of its train while approaching the crossing at which her husband was killed.

In case No. 141, the action was brought by Inez King, by her next friend, Josephine King, in the same court, because of injuries received at the same time and place, and in alleged violation of the same statute. Both cases were removed to the United States circuit court for the eastern division of the northern district of Georgia. Upon trial, verdict and judgment was rendered against the railroad company. These judgments were affirmed in the circuit court of appeals for the fifth circuit. 87 C. C. A. 284, 160 Fed. 332. The cases were then brought here by writs of certiorari.

The Federal question presented concerns the validity of the statute of the state of Georgia for violation of which a recovery was had, it being the contention of the petitioner that the statute is in violation of the interstate commerce clause of the Federal Constitution, in that it is an illegal burden upon and a regulation of interstate commerce. This statute is found in § 2222 of the Civil Code of Georgia, and reads as follows:

"There must be fixed on the line of said roads at the distance of 400 yards from the center of each of said crossings, and on each side thereof, a post, and the engineer shall be required, whenever he shall arrive at either of said posts, to blow the whistle of the locomotive until it arrives at the public road, and to simultaneously check and keep checking the speed thereof, so as to stop in time should any person or thing be crossing said track on said road."

It has been frequently decided in this court that the right to regulate interstate commerce is, by virtue of the Federal Constitution, exclusively vested in the Congress of the United States. The states cannot pass any law directly regulating such commerce. Attempts to do so have been declared unconstitutional in many instances, and the exclusive power in Congress to regulate such commerce uniformly maintained. While this is true, the rights of the states to pass laws not having the effect to regulate or directly interfere with the operations of interstate commerce, passed in the exercise of the police power of the state, in the interest of the public health and safety, have been maintained by the decisions of this court. We may instance some of the cases of this nature in which statutes have been held not to be a regulation of interstate commerce, although they may affect the transaction of such commerce among the states. In *Smith v. Alabama*, 124 U. S. 465, 31 L. ed. 508, 1 Inters. Com. Rep. 804,

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8 Sup. Ct. Rep. 564, it was held to be within the police power of the state to require locomotive engineers to be examined and licensed. In *New York, N. H. & H. R. Co. v. New York*, 165 U. S. 628, 41 L. ed. 853, 17 Sup. Ct. Rep. 418, a law regulating the heating of passenger cars and requiring guard posts on bridges was sustained. In *Lake Shore & M. S. R. Co. v. Ohio*, 173 U. S. 286, 43 L. ed. 702, 19 Sup. Ct. Rep. 465, it was held to be a valid enactment to require railway companies operating within the state of Ohio to cause three of its regular passenger trains to stop each way daily at every village containing over 3,000 inhabitants. In *Erb v. Morasch*, 177 U. S. 584, 44 L. ed. 897, 20 Sup. Ct. Rep. 819, it was held that a municipal ordinance of Kansas City, Kansas, although applicable to interstate trains, which restricted the speed of all trains within the city limits to 6 miles an hour, was a valid exertion of the police power of the state. In the case of *Crutcher v. Kentucky*, 141 U. S. 47, 35 L. ed. 649, 11 Sup. Ct. Rep. 851, this court said:

“It is also within the undoubted province of the state legislature to make regulations with regard to the speed of railroad trains in the neighborhood of cities and towns; with regard to the precautions to be taken in the approach of such trains to bridges, tunnels, deep cuts and sharp curves, and, generally, with regard to all operations in which the lives and health of people may be endangered, even though such regulations affect, to some extent, the operations of interstate commerce. Such regulations are eminently local in their character, and, in the absence of congressional regulations over the same subject, are free from all constitutional objections, and unquestionably valid.”

On the other hand, it has been held to be an illegal attempt to regulate interstate commerce to require interstate passenger trains to stop at county seats when adequate train service had already been provided for local traffic. *Cleveland, C. C. & St. L. R. Co. v. Illinois*, 177 U. S. 514, 44 L. ed. 868, 20 Sup. Ct. Rep. 722. In *Mississippi R. Commission v. Illinois C. R. Co.*, 203 U. S. 335, 51 L. ed. 209, 27 Sup. Ct. Rep. 90, it was held that orders of a state railroad commission which directed the stopping of interstate trains at certain local stations, where adequate transportation facilities had already been provided, was an unlawful attempt to regulate interstate commerce, and repugnant to the Federal Constitution.

Applying the general rule to be deduced from these cases to such regulations as are under consideration here, it is evident that the constitutionality of such statute will depend upon their effect upon interstate commerce. It is consistent with the former decisions of this court, and with a proper interpretation of constitutional rights, at least, in the absence of congressional action upon the same subject-matter, for the state to regulate the manner in which interstate trains shall approach dangerous crossings,

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the signals which shall be given, and the control of the train which shall be required under such circumstances. Crossings may be so situated in reference to cuts or curves as to render them highly dangerous to those using the public highways. They may be in or near towns or cities, so that to approach them at a high rate of speed would be attended with great danger to life or limb. On the other hand, highway crossings may be so numerous and so near together that to require interstate trains to slacken speed indiscriminately at all such crossings would be practically destructive of the successful operation of such passenger trains. Statutes which require the speed of such trains to be checked at all crossings so situated might not only be a regulation, but also a direct burden upon interstate commerce, and therefor beyond the power of the state to enact.

It is the settled law of this court that one who would strike down a state statute as violative of the Federal Constitution must bring himself, by proper averments and showing, within the class as to whom the act thus attacked is unconstitutional. He must show that the alleged unconstitutional feature of the law injures him, and so operates as to deprive him of rights protected by the Federal Constitution. *Tyler v. Registration Ct. Judges*, 179 U. S. 405, 45 L. ed. 252, 21 Sup. Ct. Rep. 206; *Turpin v. Lemon*, 187 U. S. 51, 60, 47 L. ed. 70, 74, 23 Sup. Ct. Rep. 20; *Hooker v. Burr*, 194 U. S. 415, 48 L. ed. 1046, 24 Sup. Ct. Rep. 706; *New York ex rel. Hatch v. Reardon*, 204 U. S. 152, 160, 51 L. ed. 415, 422, 27 Sup. Ct. Rep. 188, 9 A. & E. Ann. Cas. 736.

In the case at bar the Federal question was sought to be raised by an amendment to the answer. The answer originally filed was general in its nature, and did not set up the defense of violation of the Federal Constitution. The amendment filed set up that the railroad company was engaged in interstate commerce, and, at the time of the injury complained of, was operating an interstate train; and after setting up the statute of the state of Georgia for a violation of which the company was sued, averred that it was inoperative as to the defendant's train, because in violation of § 8, article 1, of the Federal Constitution, giving Congress the power to regulate commerce, and further stated:

"Your defendant further shows that the statute of Georgia is not a reasonable regulation of the police power of the state, to secure the safety of passengers, but that the statute is a direct burden on and impedes the interstate traffic being done by this defendant, and impairs the usefulness of its facilities for such traffic.

"Defendant further shows that it is impossible to observe said statute and carry the mails as defendant is required to carry them under the contract it has with the government; and it is likewise impossible to do an interstate business and at the same time comply with the terms of said statute.

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"Wherefore it says that said statute is inoperative as to it, and it should not be required to comply with the same on its interstate line of railroad.

"All which it stands ready to verify, and prays that it be hence discharged with its reasonable cost."

On oral demurrer to this amendment to the answer, the same was held insufficient, and it was dismissed. Petitioner's counsel further sought to raise the Federal question by an offer of proof at the trial by an engineer of the company, as follows:

"I expect to prove that between the South Carolina line and Atlanta there are practically one hundred road crossings, or between eighty-five and one hundred public road crossings; that the distance is 101 miles; that the crossings in some localities are very close together, and within a few hundred yards of each other, and at others farther apart, but, on the average, making a crossing to the mile, almost. We expect to show further, that, to observe the statute, and check and keep checking, so as to have a train under control, and to stop should any person or thing be on the crossing, would consume from five to ten minutes for each crossing, dependent, of course, upon the weight and length of the train and the grade; but it would make an average of seven or eight minutes. We wish to show that this train was made up and known as No. 39, the vestibule train which runs from the city of Washington, through the states of Virginia, North Carolina, South Carolina, and Georgia; that it was carrying passengers from one state to another, also carrying an express car with freight on it, from one state to another. We wish and expect to show that obedience to that crossing act would hinder, and practically prevent, interstate business being done by the defendant railroad. We wish to show the condition I have just stated all existed at the time this accident occurred, on the 11th of October, 1903."

This testimony was excluded and an exception was taken. It is apparent from this outline of the state of the record that when this testimony was offered there was no answer on file in the case under which it would be competent. A demurrer had been sustained to the amendment to the answer, and the case stood upon the complaint and the general issue filed by the defendant. It is elementary that the proof must conform to the allegations, and that without proper allegations, testimony cannot be admitted. We are then remitted to the question, Did the court err in sustaining the demurrer to the amended answer? The circuit court of appeals held, and we think correctly, that an inspection of that document shows that it did not contain a proper averment of the facts, which would show that the operation of the statute in controversy was such as to unlawfully regulate interstate commerce, and therefore deprive the railway company

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of its constitutional right to carry on such commerce unhampered by such illegal restrictions. The amended answer contains the general statement that the statute is in violation of the commerce clause of the Constitution, and a direct burden upon, and impedes, interstate traffic, and impairs the usefulness of defendant's facilities for that purpose; that it is impossible to observe the statute in carrying mails and in interstate commerce business. But these averments are mere conclusions. They set forth no facts which would make the operation of the statute unconstitutional. They do not show the number or location of the crossings at which the railway company would be required to check the speed of its trains, so as to interfere with their successful operation. For aught that appears as allegations of fact in this answer, the crossing at which this injury happened may have been so located and of such dangerous character as to make the slackening of trains at that point necessary to the safety of those using the public highway, and a statute making such requirement only a reasonable police regulation, and not an unlawful attempt to regulate or hinder interstate commerce. In the absence of facts setting up a situation showing the unreasonable character of the statute as applied to the defendant under the circumstances, we think the amended answer set up no legal defense, and that the demurrer thereto was properly sustained.

The learned counsel for the petitioner insists that under the decisions in Georgia, in the absence of a special demurrer requiring a more particular statement, the answer was sufficient. It is enough to say that we have examined those decisions, and think that they do not indicate a departure from the general rule that a pleading must state facts, and not mere conclusions, and that the want of definite allegations essential to a cause of action or defense renders a pleading subject to demurrer.

We find no error in the judgment of the Circuit Court of Appeals, and the same is affirmed in both cases.

Affirmed.

CHICAGO, R. I. & P. RY. CO. v. SMITH.

(Supreme Court of Arkansas, April 18, 1910.)

[127 S. W. Rep. 715.]

Railroads—Injury to Licensee on Tracks—Contributory Negligence.—There being no exceptional circumstances excusing the omission, it is negligence not only for one to go onto a railroad, at a public crossing, without looking in both directions and listening for a train, but also for him to walk along or on the track, or attempt to cross it at another place, without doing so, though he be a licensee.

Railroads—Injury to Licensee on Track—Contributory Negligence—Effect.*—Failure of the employees of a railroad company to keep a lookout, as required by Act April 8, 1891 (Laws 1891, c. 125), does not absolve from the effects of his contributory negligence one struck by a train while walking along or attempting to cross the track, as a licensee, without looking or listening.

Railroads—Injury to Person on Track—Contributory Negligence—Effect.†—A railroad company is not liable for the striking by its train of a licensee walking on or attempting to cross its tracks without looking or listening, unless those in charge discovered his peril in time to avoid the injury, by the use of ordinary care; though their failure to discover his peril arose from their negligence.

Trial—Instructions—Waiver of Error.—Error in giving plaintiff's requested instruction submitting the question of contributory negligence, when as matter of law there was such negligence, was waived by defendant requesting an instruction containing the same error.

Trial—Instructions—Waiver of Error.—Defendant's waiver of error, by requesting an instruction containing the same error, in the submission of the question of contributory negligence of plaintiff's intestate in failing to look or listen, or to discover the approach of a train when walking along the ties next to the track, or when he attempted to cross the track, when as matter of law he was guilty of such negligence, did not waive its right to have given its requested instruction that deceased was guilty of contributory negligence if, when approaching the railroad track and walking down the ties and attempting to cross the track, he failed to look in both directions for approach of a train.

Pleading—Conclusions—Negligence.—The complaint for negligence should set out with reasonable certainty the facts claimed to constitute the negligence; mere conclusions not being enough.

*For the authorities in this series on the subject of the combined effect of the contributory negligence of the highway traveler and negligence on the part of the defendant railroad or its employees, in an action for injuries inflicted by a train or street car at a crossing, see third paragraph of second foot-note of *Wilkinson v. Oregon Short Line R. Co.* (Utah), 34 R. R. R. 360, 57 Am. & Eng. R. Cas., N. S., 360.

†See last foot-note of *Garrison v. St. Louis, etc., Ry. Co.* (Ark.), 34 R. R. R. 543, 57 Am. & Eng. R. Cas., N. S., 543.

Chicago, etc., Ry. Co. v. Smith

Appeal from Circuit Court, Hot Spring County; W. H. Evans, Judge.

Action by Millie Smith, administratrix, against the Chicago, Rock Island & Pacific Railway Company. Judgment for plaintiff. Defendant appeals. Reversed and remanded for new trial.

T. S. Bugbee and *Jno. T. Hicks*, for appellant.

Henry Berger and *Mchaffy & Williams*, for appellee.

FRAUENTHAL, J. On April 30, 1909, about 6 o'clock p. m., Isaac Smith was run over and killed by a train of the Chicago, Rock Island & Pacific Railway Company upon its main track at its depot in the city of Malvern. The appellee instituted this action to recover damages for his alleged negligent death and recovered a judgment for \$500. The defendant prosecutes this appeal from that judgment.

Upon the opposite side of the railroad track from the depot a public street runs next to and parallel with the track. Isaac Smith crossed over this street to the main track of the railroad and stepped upon the ties next the rails at a point nearly opposite the depot. He then walked upon the ties next to and outside of the rails for a distance of from 120 to 150 feet, and then attempted to cross over the track, when a train of defendant coming from back of him ran over and killed him. The evidence on the part of the plaintiff tended to prove that the public had for some time been accustomed to use the railroad track at this place as a footwalk, and at the place where Smith attempted to cross the track the public had for some time been using the same as a public crossing. Just before Smith crossed to the railroad track, the defendant had been and was engaged in switching its cars along this track, and about the time he stepped upon the ties its engine was backing towards the depot with four cars attached at its front. At about that time the engine with the cars attached was emerging from a curve in the track which, one of the witnesses said, was about from 400 to 500 yards from the depot, but which the other witnesses say was from 400 to 500 feet therefrom. There is no testimony indicating whether or not Smith looked or listened when he crossed the street and stepped upon the ties; but the uncontradicted testimony is that he walked along the track upon the ties with his head down, and that he did not turn or look around, and that he did not turn or look in the direction from which the train was coming when he attempted to cross the track. The evidence shows that the track was straight back to said curve, and no obstruction was between it and the depot; that it was broad daylight; and that the train could have been seen if Smith had looked in the direction from which it was coming. The deceased was somewhat deaf and about 65 years old. The evidence on the part of the plaintiff

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tended further to show that when the train emerged from the curve the fireman was sitting in the cab of the engine, and was looking down the track in the direction of Smith, and continued to look in that direction from that time until the train ran over him; that no bell was rung or whistle blown; that the train did not slacken its speed from the time it left the curve until just as it struck Smith; and that during all that time Smith was walking with his back to the train and seemingly unaware of its approach.

At the request of the plaintiff the court instructed the jury, in effect, that if the deceased was walking along a portion of the railroad track which had been and was commonly and habitually used by the public as a highway for travel by persons with the knowledge and acquiescence of the defendant, and did not discover the approach of the train, and that the defendant, by failing to keep a lookout, or by failing to ring the bell or blow the whistle, or by failure to use ordinary care after discovering deceased to avoid injuring him, did negligently run over and kill the deceased, then the plaintiff was entitled to recover. It is urged by counsel for defendant that the uncontroverted testimony shows that the deceased was guilty of contributory negligence, and that therefore the instruction to the above effect was erroneous; and we think that ordinarily, under the evidence adduced in this case, this contention is correct.

It has been uniformly held by this court that, with a few exceptions which cannot apply to the uncontroverted testimony in this case, it is the duty of a person going on or near a railroad track to use ordinary care and precaution to protect himself from danger; and to use that ordinary care and precaution the law demands that he must look and listen. This rule applies whether such person is rightly there by the express or implied invitation of the railroad company, or otherwise. It applies when the traveler approaches a railroad track at a public crossing and when as a licensee he walks along or upon the railroad track. In the case of *Tiffin v. St. L., I. M. & S. R. Co.*, 78 Ark. 55, 93 S. W. 564, this court says: "It has been repeatedly held by this court that it is negligence for one approaching a railroad crossing to fail to look and listen for the approach of trains, and that only in exceptional cases is it proper to submit to the jury the question whether or not the failure to exercise such caution is negligence." And in that case the exceptional instances are set out and discussed. The case at bar is not one of those exceptional instances, because if the deceased had looked either as he walked along the ties, or as he attempted to cross the track, he could have seen the approaching train, and the circumstances were not so unusual that he could not have reasonably expected the approach of a train at that time; and he was not misled or induced by any act of defendant's agents or employees to cross

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the track. Nor will the failure on the part of the employees of the railroad company to keep a lookout as required by the act of April 8, 1891 (Laws 1891, c. 125), absolve the injured person from the effect of his contributory negligence. As is said in the case of *St. Louis S. W. Ry. Co. v. Cochran*, 77 Ark. 398, 91 S. W. 747: "The true rule which no amount of amplification can simplify is that, whenever the negligence of the plaintiff contributes proximately to cause the injury of which he complains, the defendant is not liable, unless the defendant discovered the peril in time to avoid the injury by the use of ordinary care." *Johnson v. Stewart*, 62 Ark. 164, 34 S. W. 889; *St. L., I. M. & S. R. Co. v. Leathers*, 62 Ark. 235, 35 S. W. 216; *St. L., I. M. & S. R. Co. v. Dingman*, 62 Ark. 245, 35 S. W. 219; *St. L., etc., Ry. Co. v. Jordan*, 65 Ark. 429, 47 S. W. 115.

So much of the instruction, therefore, which at the request of the plaintiff submitted to the jury the question as to whether or not the deceased was guilty of contributory negligence in failing to look and listen, or to discover the approach of the train, when he was walking along the ties next to the track or when he attempted to cross the track, was erroneous under the uncontroverted testimony adduced in this case. We think, however, that the defendant waived that particular error by requesting instruction containing the same error. By such action it invited the error. "Appellant cannot complain of an error in instructions asked by his opponent if the same error was repeated in instructions asked by himself." *Choctaw, O. & G. R. Co. v. Hickey*, 81 Ark. 579, 99 S. W. 839; *Railway Co. v. Dodd*, 59 Ark. 317, 27 S. W. 227; *St. L., I. M. & S. R. Co. v. Baker*, 67 Ark. 531, 55 S. W. 941; *L. R. & M. R. Co. v. Russell*, 88 Ark. 172, 113 S. W. 1021; *St. L., I. M. & S. R. Co. v. Carter*, 126 S. W. 99. But the defendant requested the court to instruct the jury in effect that the deceased was guilty of contributory negligence if, when approaching the railroad track, and when walking down the ties and attempting to cross the track, he failed to look in both directions for the approach of a train. The defendant did not waive the right to ask instructions to that effect.

The court refused to give the instructions so requested; and we think the court erred in its refusal so to do. It is the duty of a person crossing or traveling along a railroad track to listen and keep a lookout for approaching trains, and, where under the circumstances it can be reasonably done, to keep such lookout in both directions; and he should continue to keep such lookout in a reasonable manner until he is out of danger. In the case of *St. Louis & San Francisco R. Co. v. Crabtree*, 69 Ark. 134, 62 S. W. 64, this court, speaking through Mr. Justice Riddick, said: "When the circuit judge was asked to make the law clear to the jury on this point by telling them that one approaching a railroad track should

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'look up and down the track so long as he approaches,' we think he should have done so." In the case of *St. Louis, Iron M. & S. R. Co. v. Taylor*, 64 Ark. 364, 42 S. W. 831, we said: "There is no escaping the conclusion that a man of ordinary prudence, under the circumstances surrounding appellee, either would not have gone upon these tracks in the first instance, or, having done so, would have looked both up and down the tracks for approaching trains before walking for a distance of 30 or 40 yards directly upon one of the tracks." *Railway v. Cullen*, 54 Ark. 431, 16 S. W. 169; *Railway v. Tippet*, 56 Ark. 457, 20 S. W. 161; *Railway v. Martin*, 61 Ark. 549, 33 S. W. 1070; *Railway v. Blewitt*, 65 Ark. 235, 45 S. W. 548. But, notwithstanding the deceased under the testimony in this case was guilty of contributory negligence, the defendant would still be liable for his injury if it discovered his peril in time to have avoided the injury by the use of ordinary care. The mere failure to make the discovery of the deceased's perilous situation would not make the defendant liable, although such failure arose from the negligence of the defendant's employees. Where the person injured has thus been guilty of contributory negligence, the liability of the defendant only arises from a failure to use ordinary care after the discovery of his perilous situation. *Johnson v. Stewart*, *supra*; *St. L., I. M. & S. R. Co. v. Raines*, 86 Ark. 306, 111 S. W. 262; *St. L., I. M. & S. R. Co. v. Evans*, 74 Ark. 407, 86 S. W. 426; *Evans v. St. L., I. M. & S. Ry.*, 87 Ark. 628, 113 S. W. 642; *L. R. & M. R. Co. v. Russell*, *supra*; *St. L. S. W. Ry. Co. v. Thompson*, 89 Ark. 496, 117 S. W. 541; *Garrison v. St. L., I. M. & S. R. Co.*, 123 S. W. 657.

Inasmuch as this cause must be remanded for a new trial, we have thus announced the principles which we think are applicable to the facts adduced in evidence upon the trial of the case. We do not think that it is necessary to point out each instruction and the portion thereof which we think the court erred in giving or refusing to give. Upon the second trial the instructions, we believe, can readily be made to conform to the above principles.

Nor do we think that it is necessary to pass upon the question of the refusal of the court to require the plaintiff to make his complaint more definite and certain in its allegations of the facts constituting negligence. The former trial of this case sufficiently advised the defendant of the facts upon which the plaintiff relies to show the negligence of the defendant in causing the injury. The rules of pleading apply to actions for negligence. It is not sufficient to simply allege conclusions of law. The statement of the facts constituting the alleged negligence should be set out with reasonable certainty. In this case, should the motion be renewed to make the complaint more definite and certain in its allegations of the acts of negligence, this should be done.

For the errors indicated above, the judgment is reversed, and the cause remanded for a new trial.

DEMAND *v.* NEW YORK CENT. & H. R. R. Co.

(Court of Appeals of New York, March 15, 1910.)

[91 N. E. Rep. 259.]

Railroads—Injuries—Trespassers.—A railroad company could, by contract, prohibit a contractor doing work for it from employing subcontractors without its written consent, and a servant of a subcontractor employed without its written consent would be a technical trespasser on the railroad company's property, so that the care required of it as to such servant was that due an unintentional trespasser.

Railroads—Injuries—Injuries to Trespasser—Action—Sufficiency of Evidence.—In an action against a railroad company for the death of an employee of a subcontractor employed by the company's contractor, in violation of a contract, prohibiting the employment of subcontractors without the company's written consent, evidence held not to sustain a finding that the railroad company ratified the contractor's employment of the subcontractor.

Railroads—Injuries—Trespassers—Care Required.*—Where one occupying the position of an unintentional trespasser in defendant's yards was endeavoring to keep his horse off of one track when he was struck by a train on another track, and the engineer saw him when the engine was about 1,300 feet away, he was bound to use reasonable care to avoid injuring such trespasser.

Appeal from Supreme Court. Appellate Division, First Department.

Action by Charles A. Demand, as administrator of Grover C. Demand, against the New York Central & Hudson River Railroad Company. From a judgment on an order of the Appellate Division (130 App. Div. 875, 114 N. Y. Supp. 1123), affirming, by a divided court, a judgment for plaintiff, defendant appeals. Reversed, and new trial granted.

The action was brought to recover damages for the death of plaintiff's intestate, alleged to have been caused by the negligence of the defendant.

Defendant made a contract with the Snare & Trieste Company to erect or do work on a station on its Putnam division, north of New York City. Apparently said contractor had made a subcontract with the Vulcanite Paving Company to do part of the work, and the latter company had employed as one of its work-

*For the authorities in this series on the subject of the care due from trainmen to trespassers seen on or near tracks, see second footnote of *Miller's Adm'r v. Illinois Cent. R. Co.* (Ky.), 34 R. R. R. 396, 57 Am. & Eng. R. Cas., N. S., 396; footnote of *San Antonio, etc., Ry. Co. v. Hodges* (Tex.), 33 R. R. R. 457, 56 Am. & Eng. R. Cas., N. S., 457.

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men plaintiff's intestate. He had only commenced work on the morning of and a short time before the accident, which occurred between 8:30 and 9 o'clock. His work consisted in driving back and forth a horse attached to a rope, whereby materials were hoisted from the ground to the place where they were needed. The horse was thus moved back and forth between two of defendant's tracks, which were between 21 and 22 feet apart. There was evidence that just before the accident one of defendant's trains had passed to the south on one side of this space, with the result of causing the horse to shy or crowd over toward another track, and that, while the intestate was trying to shove or crowd him back, another of defendant's trains came south on the track towards which the horse was crowding, and struck and killed intestate, who was between the horse and the track. The engineer of this train was able to and did see the man and horse for about 1,300 feet before he struck them, and had plenty of opportunity to stop his train. He did not, however, attempt materially to reduce its speed until within about 70 or 75 feet of the man, and one of the disputed questions on the trial was whether there was anything in the appearance or actions of the horse to indicate any necessity for thus stopping his train until he made the effort.

The contract between the defendant and the original contractor provided in substance, that the latter might not make any subcontract for doing any work on the station without the written consent of one of the superior officers of the former, and there was no evidence of any such consent, and no proof of any waiver of such provision or acquiescence in any subcontract with intestate's employer either before or after the accident except as claimed to be found in some evidence given by an employee of the latter, as follows: "After the accident we had orders from the New York Central—I got orders through Snare & Trieste that we could not use a horse there any more, and that we would have to use some other conveyance. So we put in a steam hoist, which is called the 'elevator hoist,' which is mentioned as the 'hod hoist.'"

R. A. Kutschbock, for appellant.

M. L. Malevinsky, for respondent.

HISCOCK, J. (after stating the facts as above). This case was tried on the theory that, if plaintiff's intestate was rightfully on defendant's track when he was struck, the latter owed him the duty of reasonable care to avoid injuring him; that, if he was not rightfully there, it only owed him the duty to refrain from wanton or reckless conduct causing injury. The question whether he was rightfully there was made dependent on the further inquiry whether his employer had a valid subcontract for doing the work for the defendant whereon intestate was engaged

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when killed, and the court permitted the jury, despite defendant's objections and exceptions, to find that the employer did have such subcontract, and by this path to reach the conclusion that defendant was liable because of lack of reasonable care. I think there was no evidence of such valid subcontract, and that this was, therefore, error.

There is no dispute that the only contract made by the defendant was with a company other than that which employed plaintiff's intestate, and that this contract expressly provided that no subcontract might be made without the written consent of defendant's officer. This was a provision of substance which defendant had a perfect right to put in its contract and exact performance of. It may have been intended for the purpose not only of securing better work on its station, but also to prevent even such an accident as occurred by securing the right to reject any contractor or subcontractor who in the opinion of defendant would not be vigilant to prevent accidents not only to his employees but to trains passing the locality of the work.

No written consent was ever given to a subcontract with intestate's employer, nor was there any evidence that before the accident defendant either waived the provision in question or in any form consented to a subcontract or to the presence of intestate on its premises or even knew that he was there. The last was hardly possible, for he had just commenced work. The only evidence from which plaintiff seeks to supply defendant's waiver of the clause in question is the bit already quoted wherein some employee of the subcontractor testified that: "After the accident we had orders from the New York Central—I got orders through Snare & Trieste that we could not use a horse there any more." It does not appear when this order was given, and at most it was only from the original contractor, and not from the defendant, and in my opinion it is totally inadequate to serve as a basis for a finding by the jury that the defendant even after the accident assented to and ratified any subcontract.

Under these circumstances, the court erroneously charged in its main charge: "In determining what duties rested upon the defendant, it will be necessary for you to first find whether this plaintiff's intestate was upon the property of the defendant with its knowledge or consent; that is, whether he was doing work for the benefit of the defendant. If so, it was the duty of the defendant to use such care as an ordinarily prudent person would use under the circumstances. * * * If Demand was working in this place without the knowledge or consent of the defendant, then the defendant owed no further duty to this young man than the duty of not being wanton and reckless or running him down in a wanton or reckless manner."

It erroneously refused to charge as follows: "That there is no evidence in the case that there was any agreement between

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the defendant * * * and the Vulcanite Paving Company (intestate's employer) and the Westchester Contracting Company * * * by which either of those parties was to do any work upon Morris Heights Station or upon any part of it. That the only evidence in the case of a contract with any one with respect to the construction of the Morris Heights Station or any part thereof is with Snare & Trieste. That under the terms and conditions of that contract no part of the work could be sublet except by the written consent of the chief engineer of the defendant, the New York Central & Hudson River Railroad Company. * * * That there was no evidence in the case that plaintiff's intestate was upon the property of the defendant, the New York Central & Hudson River Railroad Company, with its knowledge or consent."

The other rule laid down by the court in effect that, if intestate was not on the tracks under the authority of a subcontract made with his employer, defendant owed no duty except to refrain from wanton injury, was also incorrect. There was no evidence of wanton injury, and, moreover, this was not the correct rule of conduct on the evidence.

It is not claimed that intestate went where he was as an intentional trespasser and wrongdoer. At most his trespass, so far as I can see, was technical and unintentional. It is not to be presumed that he knew of the legal relations or lack of them between his employer and defendant. In addition, the court finally charged: "That if the jury find that plaintiff's intestate got dangerously near to the south-bound track in attempting to keep the horse off of that track or farther away from it so as to avoid possible injury to the horse, they must find a verdict for the defendant." The obvious converse of this charge was that the jury must find, before rendering a verdict for plaintiff, that intestate was endeavoring to keep the horse off the track so as to avoid an accident to the approaching train. Under such conditions, the engineer, having seen intestate when he was about 1,300 feet away, became obligated to use reasonable efforts and care to avoid injuring the latter, even though primarily and originally he may have been a technical trespasser, and, if the jury chose to believe it, there was evidence justifying the conclusion that the actions of the horse were such that reasonable prudence required the train to be stopped or slowed down before it was. *Remer v. L. I. R. R. Co.*, 36 Hun, 253, affirmed 113 N. Y. 669, 21 N. E. 1116; *Wasmer v. D., L. & W. R. R. Co.*, 80 N. Y. 212, 36 Am. Rep. 608; *Rider v. Syracuse Rapid Transit Ry. Co.*, 171 N. Y. 139, 63 N. E. 836, 58 L. R. A. 125.

Passing by the consideration of defendant's duty, there was sufficient evidence to make the question of intestate's contributory negligence one of fact.

I do not overlook the possibility that by a somewhat compli-

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cated process of reasoning we might reach the conclusion that, notwithstanding the erroneous instructions which they received, the jury must have found facts sufficient to sustain the judgment on a correct theory. But notwithstanding this may be so, there was so much misapprehension concerning the issues to be submitted to the jury that it seems much preferable that there should be a retrial, whereon, under correct instructions, the jury can intelligently decide the issues essential to the disposition of the case.

The judgment, therefore, should be reversed, and a new trial granted; costs to abide event.

CULLEN, C. J., and HAIGHT, WERNER, GRAY, WILLARD BARTLETT, and CHASE, JJ., concur.

Judgment reversed, etc.

EUSTIS v. BOSTON ELEVATED RY. CO.

(Supreme Judicial Court of Massachusetts, Suffolk, May 19, 1910.)

[91 N. E. Rep. 881.]

Street Railroads — Operation — Injuries to Travelers Crossing Tracks.*—Where plaintiff, driving in a horse-drawn vehicle on a public street at a right angle to defendant street car tracks, saw a car at a standstill 60 feet or more away, when he was 15 or 20 feet from the track, and, thinking he could cross in safety, started to do so, and the car struck the rear wheel of his vehicle, he was not negligent as a matter of law.

Trial—Direction of Verdict—Grounds—Contributory Negligence.—That plaintiff's testimony in some of its aspects was so contradictory that it could not be true did not authorize the direction of a verdict against him; the question whether any of such evidence, and, if any, how much of it, was worthy of belief, being for the jury.

Exceptions from Superior Court, Suffolk County; John F. Brown, Judge.

Action by one Eustis against the Boston Elevated Railway Company. A verdict was directed for defendant, under an agree-

*For the authorities in this series on the subject of the right to cross street railway tracks in front of a car with knowledge that it is approaching, see first foot-note of *Hellieson v. Seattle Elect. Co.* (Wash.), 34 R. R. R. 337, 57 Am. & Eng. R. Cas., N. S., 337; first foot-note of *Keefe v. Seattle Elect. Co.* (Wash.), 33 R. R. R. 725, 56 Am. & Eng. R. Cas., N. S., 725; second paragraph of third foot-note of *Norfolk & P. T. Co. v. Forrest's Adm'r* (Va.), 33 R. R. R. 472, 56 Am. & Eng. R. Cas., N. S., 472; *Birmingham Ry., etc., Co. v. McLain* (Ala.), 33 R. R. R. 463, 56 Am. & Eng. R. Cas., N. S., 463.

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ment that, if the ruling was wrong, judgment should be entered for plaintiff in the sum of \$500, otherwise the verdict was to stand, and plaintiff brings exceptions. Judgment ordered for plaintiff.

The action was in tort for injury sustained by plaintiff while traveling on Main street, in Charlestown, on October 16, 1906, at about 8:15 o'clock in the evening, in consequence of a collision between a team which plaintiff was driving, and one of the defendant's street cars.

Coakley & Sherman and W. Flaherty, for plaintiff.

R. A. Stewart and L. R. Chamberlin, for defendant.

RUGG, J. There was evidence from which it might have been found that the plaintiff, traveling in a horse-drawn vehicle upon a public way and observing the law of the road, approached at a right angle the tracks of the defendant, and, when 15 or 20 feet from them saw a car at a standstill 60 feet or more away. Thinking that he might do so with safety, he started to drive across the tracks and was injured by the car striking his rear wheel. The case, therefore, should have been submitted to the jury under many recent authorities. *O'Brien v. Lexington & Boston Street Ry.*, 205 Mass. 182, 91 N. E. 204; *Hatch v. Boston & Northern Street Ry.*, 205 Mass. —, 91 N. E. 523; *Callahan v. Boston Elevated Ry.*, 205 Mass. —, 91 N. E. 388; *Carroll v. Boston Elevated Ry.*, 205 Mass. —, 91 N. E. 525; *Wright v. Boston & Northern Street Ry.*, 203 Mass. 569, 89 N. E. 1073; *Robbins v. Dartmouth & Westport St. Ry.*, 203 Mass. 546, 89 N. E. 1039; *Jeddrey v. Boston & Northern Street Ry.*, 198 Mass. 232, 84 N. E. 316; *Stubbs v. Boston & Northern Street Ry.*, 193 Mass. 513, 79 N. E. 795; *Halloran v. Worcester Consolidated Street Ry.*, 192 Mass. 104, 78 N. E. 381. The chief argument urged in behalf of the defendant is that in some of its aspects the testimony of the plaintiff was so contradictory that it could not be true. But whether any of this evidence and how much of it was worthy of belief was a question of fact.

In accordance with the terms of the report the entry must be:

Judgment for the plaintiff in the sum of \$500.

HORSMAN *v.* BROCKTON & P. ST. RY. CO. DAVIS *v.* SAME.
(Supreme Judicial Court of Massachusetts, Plymouth, May 17, 1910.)

[91 N. E. Rep. 897.]

Street Railroads—Operation—Management of Cars.*—The demand for rapid transportation by street railway companies does not relieve them from compliance with the law of the road, subject only to the modifications that the path of the car is fixed, while travelers, either on foot or in vehicles, may use the entire way, so far as it has been fitted and opened for public travel.

Street Railroads—Operation—Injuries to Travelers—Contributory Negligence.†—The rule that, where a highway crosses a steam railroad at grade, a traveler who neglects either to look or listen for approaching trains before crossing, but passes on and is injured, cannot recover, does not apply in favor of street railroads.

Street Railroads—Operation—Injuries to Persons on Street—Management of Car.‡—A street railroad is required to regulate the speed of a car, and, if necessary, to sound the gong, that travelers using due care while passing upon the track from intersecting driveways or streets may not be imperiled by collisions.

Street Railroads—Operation—Injuries to Person on Street—Evidence.—Evidence that plaintiff, driving towards a street railroad, some distance before he reached the track, could see 300 feet up the track, and see that there were no cars approaching, but as he approached nearer his view was obstructed, justified the jury in finding that to again look and listen, where he knew that any further observation would have been prevented till he arrived so near the track that he could not turn back, was uncalled for.

Street Railroads—Operation—Injuries to Person on Track—Questions for Jury.—Whether plaintiff, driving toward a street car track, having observed the track some time before he reached it, at a distance of 300 feet from the crossing, properly acted on his judgment

*For the authorities in this series on the subject of the mutual rights and duties of street railways and other users of streets, see first foot-note of *Carroll v. Connecticut Co.* (Conn.), 34 R. R. R. 780, 57 Am. & Eng. R. Cas., N. S., 780; *Powers v. Des Moines City Ry. Co.* (Iowa), 34 R. R. R. 597, 57 Am. & Eng. R. Cas., N. S., 597; *Hellieson v. Seattle Elec. Co.* (Wash.), 34 R. R. R. 337, 57 Am. & Eng. R. Cas., N. S., 337; second foot-note of *Keefe v. Seattle Elec. Co.* (Wash.), 33 R. R. R. 725, 56 Am. & Eng. R. Cas., N. S., 725.

†See last foot-note of *Carroll v. Connecticut Co.* (Conn.), 34 R. R. R. 780, 57 Am. & Eng. R. Cas., N. S., 780; third foot-note of *Hellieson v. Seattle Elec. Co.* (Wash.), 34 R. R. R. 337, 57 Am. & Eng. R. Cas., N. S., 337; first foot-note of *Cable v. Spokane, etc., R. Co.* (Wash.), 31 R. R. R. 206, 54 Am. & Eng. R. Cas., N. S., 206.

‡For the authorities in this series on the subject of the duty to regulate the speed of street cars for the safety of other users of streets, see first foot-note of *Robbins v. Dartmouth & W. St. Ry. Co.* (Mass.), 34 R. R. R. 778, 57 Am. & Eng. R. Cas., N. S., 778; *United Rys. & Elec. Co. v. Carneal* (Md.), 34 R. R. R. 705, 57 Am. & Eng. R. Cas., N. S., 705; foot-note of *Louisville Ry. Co. v. Flannery* (Ky.), 34 R. R. R. 310, 58 Am. & Eng. R. Cas., N. S., 310.

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that if a car came at the usual rate of speed he had ample time to go over, or whether he should have stopped, alighted, and ascertained before attempting to cross, if a car was coming, were questions of fact, and not of law.

Street Railroads—Operation—Injuries to Person on Track—Relevancy of Evidence.—In an action for injuries in a collision between a vehicle and a street car, plaintiff's knowledge of defendant's method of operating its cars, as to speed and sounding its gong at intersecting streets, which he claimed was not rung in this case, was relevant.

Street Railroads—Operation—Injuries to Person on Track—Negligence of Defendant.—Where a street car was moving at a rate of speed forbidden by the town ordinances, and in violation of the rules of the road, and without giving the customary signals of its approach, the jury were warranted in finding that the accident was caused by the negligence of the motorman, for whose acts the company would be responsible.

Exceptions from Superior Court, Plymouth County; Henry A. King, Judge.

Actions by William S. Horsman and by Charles H. Davis against the Brockton & Plymouth Street Railway Company. Verdict directed for defendant, and plaintiffs except. Exceptions sustained.

James H. Vahey and John P. Vahey (Philip Mansfield, of counsel), for plaintiffs.

Henry F. Hurlburt, Jas. T. Connolly, and Damon E. Hall, for defendant.

BRALEY, J. In the first case the plaintiff sues for personal injuries caused by a collision of the defendant's car with the team which he was driving, while the second action is brought by the owner for damages to his horse and wagon. At the close of the evidence verdicts for the defendant having been ordered, because the presiding judge was of opinion as matter of law "that it appeared that at the time of the accident the plaintiff was not in the exercise of due care," the question for decision is whether the ruling was erroneous. It is doubtless true, as the defendant strongly urges, that since the elimination of horse cars and the substitution of electricity, passengers desire rapid transportation, and for their accommodation a heavier and more expensive equipment has been provided, with increased speed. But this demand, even when properly recognized within reasonable limits, does not relieve the carrier from compliance with the law of the road, subject only to the modifications often pointed out, that the path of the car is fixed, while travelers, either on foot or in vehicles, may use the entire way so far as it has been fitted and opened for public travel. *Scannell v. Boston Elevated Ry.*, 176 Mass. 170, 173, 57 N. E. 341; *Wright v. Boston & Northern Ry.*, 203 Mass. 569, 89 N. E. 1073. If the general rule, that

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where a highway crosses the tracks of a steam railroad at grade and when such conduct is necessary for his safety, a traveler who neglects to take the precaution either to look or listen for approaching trains before crossing, but passes on and is injured, cannot recover, because he has failed to act with ordinary prudence, this rule of conduct, which has become a rule of law, has not been applied in favor of street railways in their use of the public ways. *Hennessey v. Taylor*, 189 Mass. 583, 76 N. E. 224, 3 L. R. A. (N. S.) 345; *Scannell v. Boston Elevated Ry.*, 176 Mass. 170, 173, 57 N. E. 341; *O'Brien v. Lexington & Northern St. Ry.*, 204 Mass. —, 91 N. E. 204. If adopted, it would not only unduly delay traffic on the principal streets of cities and towns, which generally are selected for a franchise by the company, but render the streets extremely dangerous for the accommodation of the general public, for whose use they were primarily designed. *Com. v. N. Y. Central & Hudson River R. R.*, 202 Mass. 394, 398, 88 N. E. 764, 23 L. R. A. (N. S.) 350. If companies operating interurban lines running over highways, which for long distances are not subjected to much public travel, should have the privilege of an exclusive and paramount right of way analogous to that conferred upon steam railroads, it is for the Legislature to grant the right, and to define the conditions under which it shall be exercised. The defendant, in the management of the car at the time and place of the accident, was required so to regulate its speed, and, if necessary, to sound the gong, that travelers using due care while passing upon the track from intersecting driveways, or streets, should not be imperiled by collisions. *Driscoll v. West End St. Ry.*, 159 Mass. 142, 34 N. E. 171; *Scannell v. Boston Elevated R. R.*, 176 Mass. 170, 173, 57 N. E. 341; *Halloran v. Worcester Consolidated St. Ry.*, 192 Mass. 104, 78 N. E. 381; *Fallon v. Boston Elevated Ry.*, 201 Mass. 179, 87 N. E. 480.

The plaintiff was passing down the driveway to turn into the street, when the team as it reached the track was struck by a car coming from the south. For a distance of about 85 feet above the track, the driveway on the south side was lined with trees and shrubbery in full foliage, obstructing the view either of the track, or of cars coming from that direction. But, before reaching this point, at least 300 feet of the track extending southerly from the intersection of the driveway could be clearly seen. The plaintiff, who was familiar with the vicinity, testified that at this point he leaned forward and looked down the track, but, not seeing a car, he sat back, and drove on at moderate speed, listening meanwhile for vehicles whose approach might require him to change his course. If the jury believed this evidence, they could have found that a failure again to look, where in passing he knew any further observation would have been effectually prevented until he arrived so near the track that he could not

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turn back before being hit, was uncalled for by way of further precaution. *Kelly v. Wakefield St. Ry.*, 179 Mass. 542, 61 N. E. 139. Naturally he must have been aware that cars were passing at intervals, but whether, having acted upon his judgment, as he said he did, that if a car came along at the usual rate of speed he had ample time to get over, or whether he should have stopped, alighted, and ascertained, before attempting to cross, if a car was coming, were questions of fact and not of law. *Coleman v. Lowell & Lawrence & Haverhill St. Ry.*, 181 Mass. 591, 64 N. E. 402; *Orth v. Boston Elevated R. R.*, 188 Mass. 427, 74 N. E. 673; *Hennessey v. Taylor*, 189 Mass. 583, 76 N. E. 224, 3 L. R. A. (N. S.) 345; *Robbins v. Dartmouth & Westport St. Ry.*, 203 Mass. 546, 89 N. E. 1039; *O'Brien v. Lexington & Northern St. Ry.*, 204 Mass. —, 91 N. E. 204.

In passing upon the plaintiff's conduct, his knowledge of the defendant's method of operating its cars as to speed, and sounding the gong at intersecting streets, which he claimed was not rung, was relevant. If from previous experience as a motorman in its employ, or as a passenger, he knew that ordinarily the defendant took these precautions, how far the presumption of their continuance, and that the motorman would not act carelessly, should have influenced him in deciding to proceed, were for the jury. *Driscoll v. West End St. Ry.*, 159 Mass. 142, 34 N. E. 171; *O'Brien v. Lexington & Northern St. Ry.*, 204 Mass. —, 91 N. E. 204; *Finch v. Mansfield*, 97 Mass. 89, 92. Nor is the case at bar governed by the decision in *Ferguson v. Old Colony St. Ry.*, 204 Mass. 340, 90 N. E. 535, on which the defendant places much reliance. In that case, the plaintiff, without taking any precautions, drove directly in front of an oncoming car, which by the exercise of ordinary prudence he could have seen and avoided.

We are accordingly of opinion that there must be a new trial, and as the question of the defendant's negligence has been argued, and may then be presented, it should be decided. If upon the evidence, which was sufficient for the purpose, the jury were satisfied that the car was moving at a rate of speed forbidden by the ordinances of the town, as well as in violation of the rules of the road, and without giving the customary signal of its approach, they would be warranted in finding that the accident was caused by the negligence of the motorman, for whose acts the defendant would be responsible. *Wright v. Malden & Melrose R. R.*, 4 Allen, 283; *Finnegan v. Winslow Skate Mfg. Co.*, 189 Mass. 580, 582, 76 N. E. 192; *Stevens v. Boston Elevated Ry.*, 184 Mass. 476, 69 N. E. 338; *Williamson v. Old Colony St. Ry.*, 191 Mass. 144, 77 N. E. 655, 5 L. R. A. (N. S.) 1081; *Beale v. Old Colony St. Ry.*, 196 Mass. 119, 81 N. E. 867.

Exceptions sustained.

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(Supreme Court of Oregon, April 5, 1910.)

[107 Pac. Rep. 964.]

Appeal and Error—Assignment of Errors—Abandonment.—Assignments of error not argued in the brief will be considered abandoned or waived.

Street Railroads—Collision with Vehicle—Actions—Sufficiency of Evidence.—In an action for injuries from a collision between a street car and plaintiff's vehicle, evidence as to the negligent operation of the car held sufficient to go to the jury.

Street Railroads—Operation—Negligence—Violation of Speed Ordinance.*—The purpose of an ordinance limiting the speed of a street car is to protect the public, which may assume that it will be observed, and the moving of a car at a greater speed than that permitted by the ordinance is evidence of negligence sufficient to go to the jury in an action for injuries from a collision with the car.

Street Railroads—Injury to Persons on Street—Contributory Negligence—Effect.—To recover for negligence caused by collision with a street car negligently running at a speed prohibited by ordinance, the injured person must not have been guilty of negligence proximately contributing to the injury.

Street Railroads—Crossing Accidents—Duty to Look and Listen.†—It is presumptively negligent for a pedestrian to attempt to cross a railway track without looking and listening when if he had looked and listened he would have discovered the approach of a car in time to have avoided injury, but he is not required to look or listen at any particular place or given distance from the crossing, but only to do so at the time and place necessary in the exercise of ordinary care.

*For the authorities in this series on the question whether running train or street car in violation of a speed ordinance is negligence, see *Dyson v. Southern Ry. Co. (S. Car.)*, 33 R. R. R. 486, 56 Am. & Eng. R. Cas., N. S., 486; second foot-note of *Norfolk, etc., Co. v. Forrest's Adm'x (Va.)*, 33 R. R. R. 472, 56 Am. & Eng. R. Cas., N. S., 472; *Wilson v. Puget Sound Elec. Ry. Co. (Wash.)*, 32 R. R. R. 311, 55 Am. & Eng. R. Cas., N. S., 311; first foot-note of *Henry v. Cleveland, etc., Ry. Co. (Ill.)*, 32 R. R. R. 48, 55 Am. & Eng. R. Cas., N. S., 48; *Kern v. Des Moines City Ry. Co. (Iowa)*, 32 R. R. R. 29, 55 Am. & Eng. R. Cas., N. S., 29; first foot-note of *Seaboard A. L. Ry. v. Smith (Fla.)*, 25 R. R. R. 793, 48 Am. & Eng. R. Cas., N. S., 793.

For the authorities in this series on the question whether a person about to cross railroad tracks has the right to presume that street cars or trains will not approach at unlawful speed, see third paragraph of foot-note of *Grimm v. Milwaukee, etc., Co. (Wis.)*, 32 R. R. R. 665, 55 Am. & Eng. R. Cas., N. S., 665; *Kern v. Des Moines City Ry. Co. (Iowa)*, 33 R. R. R. 29, 55 Am. & Eng. R. Cas., N. S., 29; *Clemons v. Chicago, etc., R. Co. (Wis.)*, 31 R. R. R. 491, 54 Am. & Eng. R. Cas., N. S., 491.

†As to the duty to lookout for street cars before attempting to cross tracks, see second foot-note of preceding case.

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Street Railroads—Injury to Pedestrian—Contributory Negligence—Question for Jury.—The question whether a pedestrian injured by a street car exercised ordinary care in looking for the car before attempting to cross the track is usually for the jury.

Street Railroads—Operation—Care Required.‡—Street railroad cars and the general public have an equal right to the reasonable use of the public highways, but there is a resulting mutual obligation resting upon each to exercise such right with reasonable care so as not to reflect injury upon another, and a street car company cannot, by running its cars at an unusual and unlawful speed at crossings, make its limited right a preferred right of way, nor can the driver of a vehicle escape responsibility for injuries resulting from his careless driving or lack of diligence.

Street Railroads—Operation—Approaching Crossing.§—Operators of street cars must have the cars under such control at crossings so as to yield to the driver of a vehicle the right to the use of a crossing acquired by him by reaching the crossing while the car is at such distance therefrom that it can be stopped in time to allow him to pass in safety.

Street Railroads—Crossing Accident—Negligence.||—When plaintiff's team reached the curb of a street on which there was a street railway, the rear of the wagon was about 35 feet distant from the center of the nearer track, and the team was traveling about six miles an hour. An approaching car on that track was then about 240 feet distant, and neither plaintiff nor the person with him observed that it was moving at an unusual speed. Held, that it could not be said as matter of law that the car was so close that reasonable men would say that plaintiff attempting to cross the track was not acting as a reasonably prudent man should act under the circumstances; and hence plaintiff was not negligent as matter of law.

Street Railroads—Crossing Accident—Actions—Indefinite Charge.—In an injury action by a driver struck by a street car at a crossing, a charge that it was not enough for a driver to look and listen for a car when he is some distance from the track without making any further effort to do so, and if a driver simply looked for a car when he is at a considerable distance from the track, and then drove onto the track without taking further precaution, he was not in the exercise of ordinary care, was too uncertain and indefinite as to the facts assumed upon which to base a definition of ordinary care and

‡See first foot-note of preceding case.

§See third foot-note of preceding case.

||For the authorities in this series on the subject of the right to cross street railway tracks with the knowledge that a car is approaching, see *Hellieson v. Seattle Elec. Co.* (Wash.), 34 R. R. R. 337, 57 Am. & Eng. R. Cas., N. S., 337; *Henry v. Seattle Elec. Co.* (Wash.), 33 R. R. R. 721, 56 Am. & Eng. R. Cas., N. S., 721; second paragraph of first foot-note of *Norfolk & P. T. Co. v. Forrest's Adm'x* (Va.), 33 R. R. R. 472, 56 Am. & Eng. R. Cas., N. S., 472; first foot-note of *Birmingham, etc., Co. v. McLain* (Ala.), 33 R. R. R. 463, 56 Am. & Eng. R. Cas., N. S., 463.

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erroneously confined the definition of such term to the determination of a single fact, instead of all surrounding circumstances.

Street Railroads — Crossing Accident — Negligence — Proximate Cause.—Though a driver of a vehicle approaching a street car crossing negligently failed to look a second time, after he entered the street on which the track was and drove upon the track, yet if, when the motorman in the approaching car saw or should have seen the wagon going upon the track ahead of the car, he had sufficient time and space within which to stop the car and prevent the collision, and failed to do so, his negligence would be the sole proximate cause of the injury, and the driver's act charged to be negligence would not be contributory thereto.

Trial—Refusal of Requests—Requests Embraced in General Charge Given.—It is not error to refuse a request substantially covered by the general charge.

Appeal from Circuit Court, Multnomah County; John B. Cleland, Judge.

Action by M. M. Donohoe against the Portland Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

This is an action to recover damages for personal injuries sustained by plaintiff on February 7, 1908, resulting from being thrown violently from the seat of an ice wagon, drawn by two horses, caused by defendant's electric street railway car colliding with the wagon as it was crossing the track at the intersection of Seventh and Burnside streets, in the city of Portland. The specific acts of negligence charged in the complaint are: That the car was being operated at a rate of speed prohibited by the law of the city of Portland, to wit, in excess of 12 miles an hour; that defendant operated the car at an unreasonable and unsafe speed in respect to the character of the place where the accident occurred; that the motorman in charge of the car, after he saw, or should have seen, the wagon crossing the track in front of the car, negligently failed to stop, or to attempt to stop, the car, there being ample time and space in which to do so, and thus prevent the collision. The answer contains a general denial of the complaint, and affirmatively pleads contributory negligence by the plaintiff as the proximate cause of the injury complained of, in that he failed to look or listen for a car, or exercise any precautions for his own safety as he approached the track, and that, although the car was in plain view, and the plaintiff reasonably should have seen it in time to notify one Harrigan, the driver, of the approach of the car, and could thereby have avoided the accident, he nevertheless permitted Harrigan to drive the team at a high rate of speed upon the track immediately in front of the car. The new matter of the answer was put at issue by the reply. At the conclusion of

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plaintiff's case there was a motion by the defendant for a judgment of nonsuit, which was denied, and the cause was submitted to the jury, which rendered a verdict for plaintiff. From the judgment entered thereon, defendant has appealed.

S. C. Spencer (*Wilbur & Spencer*, on the brief), for appellant.

Dan J. Malarkey (*Gammans & Malarkey* and *E. B. Seabrook*, on the brief), for respondent.

SLATER, J. (after stating the facts as above). Numerous assignments of error have been set forth in appellant's printed abstract of the record, but in its brief counsel have referred to but three or four of them. Hence we shall consider as abandoned and waived all assignments of error upon which no argument has been presented in the brief.

The first matter upon which error is predicated is the denial of the motion for a nonsuit, which was urged upon two grounds: (1) That no negligence of the defendant was shown; and (2) that it was shown that plaintiff was guilty of contributory negligence, which was the proximate cause of the injury.

Plaintiff's evidence tends to show that defendant is the owner of, and operates, an electric street railway system in the city of Portland, under a franchise forbidding the propulsion of the cars at a greater speed than twelve miles an hour; that, under this franchise, plaintiff operates such cars upon a double track along Burnside street, which extends easterly and westerly. Of these the north track is used by cars going west, and the south track by cars going east. Seventh street extends north and south, intersecting Burnside street at right angles, and is paved with rough stone, or Belgian blocks; while Burnside street, to the intersection with Seventh street, is covered with a smooth-surface pavement. About 3 o'clock in the afternoon of February, 7, 1908, plaintiff, by the invitation of Harrigan, was riding upon the seat of the ice wagon. Harrigan was driving south, along the west side of Seventh street, about four feet from the curb, and, when the team approached the intersection of that street with Burnside street, it was traveling at about the rate of six miles an hour. The wagon contained no load, was heavy, and made considerable noise on the rough pavement. It was covered, the cover extending as a canopy over the seat, but not extending down the sides opposite the seat, so as to obstruct the view of the driver. As the heads of the horses came about even with the curb of the sidewalk, on the north side of Burnside street, both plaintiff and Harrigan looked easterly down Burnside street, and saw, about the middle of the block, between Sixth and Seventh streets, the defendant's car, apparently coming west on the north track; but the evidence indicates that they did not notice it was coming at an unusual speed, as they were

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looking in an almost direct line with the approach of the car. Burnside street and Seventh street, north of the intersection thereof at this point, are 70 feet in width, of which space 12 feet on each side is occupied with the sidewalk, leaving 36 feet of street for the use of vehicles. But south of the intersection Seventh street widens, the west line thereof receding 26 feet, leaving the southwest corner of the street intersection that much further west than the northwest corner. Harrigan, believing that he had ample time to safely cross the track before the car reached the crossing, did not check the speed of the team, but allowed it to continue in a direct line across the track at a speed as before stated of about six miles an hour. As the rear wheel of the wagon reached the middle of the north track, the defendant's car struck the left rear wheel of the wagon, evidently with a very considerable force, lifting it somewhat into the air, and, throwing the back part thereof around, moved it about 30 feet westerly and 16 feet southerly, so that the opposite rear wheel, after the accident, was resting upon the curb at the southwest corner of the street intersection, at which time the horses and wagon then occupied an easterly and westerly position, whereas, before the accident, they were in a northerly and southerly position. Plaintiff was thrown violently from the seat of the wagon to the pavement, striking upon his head and face, receiving severe laceration of the scalp and face and a concussion of the brain, which rendered him unconscious for many hours.

A number of witnesses, most of whom, because of previous experience as brakemen or motormen upon railway cars, appeared to be well qualified to judge of the speed at which the car was traveling, testified that, as the car approached the crossing and the place of collision, it was traveling in excess of 12 miles an hour, their opinions, of course, differing and varying from something above that rate to as much as 17 miles an hour, and that there was no perceptible checking of the speed of the car prior to the accident. One of such witnesses testified that he was observing the motorman just previous to the collision, and perceived no checking of the car's speed, nor did he see the motorman reverse the current, although he said that might have been done without his being able to observe it, nor did the motorman apply the brakes. The evidence also tends to show that the car in question is approximately 30 feet in length, and contained at that time about six passengers; that it was provided with a ratchet or hand power brake, and an electric controller for reversing the current, as well as a device for sanding the rails; that with such equipment, used with reasonable proficiency upon a dry day, the car, when going at 15 miles an hour, should be brought to a stop within 30 to 35 feet; that in usual service it is considered an easy matter by motormen to stop a car upon an ordinary street within 40 or 50 feet with the ratchet brake

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alone; that, when a stop is to be made at a further crossing of a street intersection, the front of the car is allowed to proceed across the first crossing before the brake is applied to bring the rear of the car to a stop at the next crossing, and such is considered to be easy of accomplishment. The place of the accident in question has little or no grade; if any, a slight upgrade in the direction the car was moving. The day was perfectly dry; there having been no rain. Now, the plaintiff's case shows that when the car had come to a stop, after the collision had taken place, the rear of the car was about even with the property line on the west side of Seventh street, north of the track. This would place the head of the car not less than 50 to 55 feet from the point of contact. One witness, however, says that the car moved about 40 feet after colliding with the wagon. The plain inferences deducible therefrom are, not only that the car was moving at an unusually high rate of speed, but also that, whatever might have been the rate of speed of the car within the range of the estimate of the various witnesses, the brakes were not applied by the motorman until almost at the instant of the collision, which in our opinion of itself establishes a prima facie case of negligence in the operation of the car sufficient to take the case to the jury. As corroborative of this fact the evidence shows by the testimony of the conductor of the car that the motorman was a new man upon that route, that being his first day of service. He was what is termed an "extra man," and his experience in the management of electric street cars was evidently very limited.

The purpose of the ordinance limiting the speed of a street car is for the protection of the public, which has a right to act on the assumption that its requirements will be observed, and therefore the moving of the car at a greater speed than that permitted by the law is evidence of negligence sufficient to be submitted to a jury. *Beck v. Vancouver Ry. Co.*, 25 Or. 32, 34 Pac. 753. But it must appear that, although the defendant was negligent, the injury was caused by the unlawful speed, without the contrary negligence of the person complaining, which was the proximate cause of the injury. *Kunz v. O. R. & N. Co.*, 51 Or. 191, 93 Pac. 141, 94 Pac. 504. It is upon this latter phase of the question that defendant has chiefly relied to sustain its motion for a nonsuit, and it is urged that although the evidence shows that both plaintiff and Harrigan looked, as they approached the crossing, and saw the car coming, yet it was but a passing or fleeting glance, and made at such a distance from the track that plaintiff was not justified in relying upon any impressions received at that time as to the distance of the car, or the speed at which it was coming, but that the duty was upon him to continue to look until he was safely across. Most of the cases cited in support of this contention are from the state of Pennsylvania, where it has been held that the duty to look is

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not performed by looking when first entering on the street intersection, but that such duty continues until the track is reached, and that the party must look the instant before he enters upon the track (*Burke v. Union Traction Co.*, 198 Pa. 497, 48 Atl. 470; *Pieper v. Union Traction Co.*, 202 Pa. 100, 51 Atl. 739; *Ehrisman v. East Harrisburg City Pass. Ry. Co.*, 150 Pa. 180, 24 Atl. 496, 17 L. R. A. 448); and, in default thereof, it is declared that the party so conducting himself is guilty of negligence per se. But this extreme view of the law does not seem to have been favorably accepted by the courts of other states. Several cases are brought to our attention from other states, applying practically the same doctrine to pedestrians walking leisurely across a street and onto a track without observing, after having left the curb of the sidewalk, whether any car was approaching, and being struck by the car the instant entrance was made upon the track. These cases present in our view a somewhat different state of facts from those presented in this case. See *Metz v. St. Paul City Ry. Co.*, 88 Min. 48, 92 N. W. 502; *Lofsten v. Brooklyn Heights R. R. Co.*, 184 N. Y. 148, 76 N. E. 1035; *Boring v. Union Traction Co.*, 211 Pa. 594, 61 Atl. 77; *Fitzgerald v. N. Y. City Ry. Co.* (Sup.) 92 N. Y. Supp. 733; *Lynch v. Third Ave. R. Co.*, 88 App Div. 604, 85 N. Y. Supp. 180. In this state the rule has been established that it is presumptively negligent on the part of a pedestrian to attempt to cross a railway track without looking or listening, when, if he had looked and listened, he would have discovered the approach of the car in ample time to avoid injury. *Smith v. City Ry. Co.*, 29 Or. 539, 46 Pac. 136, 780; *Wolf v. City Ry. Co.*, 45 Or. 447, 72 Pac. 329, 78 Pac. 668. But it has also been held by this court that, although it is negligence for the traveler not to look and listen for approaching trains before attempting to cross a railway track, the law does not undertake to determine whether he shall do so at any particular place or given distance from the crossing. It is only required that he shall look and listen at the time and place necessary in the exercise of ordinary care; and this is generally a question for the jury, under all the circumstances of the particular case. *Hecker v. O. R. & N. Co.*, 40 Or. 6, 66 Pac. 270. While it has been said the rule applicable to travelers upon highways approaching steam railroad crossings does not apply with the same force to street railways, because the streets are equally open to pedestrians as well as to street railway companies, yet we think the rule above stated should apply to questions of this character; for, as said by Mr. Justice Bean in the case last quoted, "the evidence shows that he (plaintiff) was looking and listening for approaching trains. Whether he did so at the proper time and place, and whether, in order to do so effectively, he should have stopped, were all questions for the jury, and properly submitted to them." Especially would

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such be the case where, as here, the evidence shows that the plaintiff did see the car, and, apparently at least, acted in good faith, upon a state of facts appearing sufficient to induce a reasonable man to believe that he might cross in safety.

Street railway cars and the general public have an equal right to the reasonable use of the public highways, but there is a resulting mutual and reciprocal obligation resting upon each to exercise such right with reasonable care so as not to inflict injury upon another in such places. Also the law imposes upon the operators of such cars the duty of having the car under control at crossings, so as to seasonably and efficiently yield to the driver of a vehicle the right to the use of a crossing acquired by him by reaching the crossing before the car was in such proximity thereto that it could not be stopped in time to allow him to pass in safety. Neither one, however, can unreasonably delay the other in the exercise of the right to cross; nor do we think that a street car company may by causing its cars to travel at an unusual and unlawful rate of speed at such crossings so magnify its limited right to the reasonable use of the street as to make of it a preferred right of way, and likewise subordinate the concurrent and equal right of an ordinary traveler. Nor, on the other hand, can the driver of a vehicle be permitted to escape responsibility for injuries resulting from his own equivocal acts, careless driving, or lack of diligence in exercising a right which he assumes to claim. In this case, however, the team was traveling at a rapid, unvarying but not unlawful, speed, and the driver, therefore, was exercising with reasonable diligence the right claimed by him to the use of the crossing in advance of the car, and, by his acts, he manifested to the motorman his intention to claim such prior right when he proceeded to cross without checking or stopping his horses. "A driver of an ordinary vehicle can proceed at a highway crossing to go over a street railway in the face of an approaching car when, and only when, he has reasonable ground for believing that he can pass in safety, if both he and those in charge of the car act with reasonable regard to the rights of others. The duty to slow up or stop, if necessary to prevent a collision, rests equally on each party. Under ordinary circumstances, the first to reach the crossing, if each has been moving at a reasonable rate of speed, has the right to proceed over it before the other; but, if it be apparent to the driver that the motorman does not intend to respect this right he must stop and give way, if a collision can thus be avoided." Baldwin, Railroad Law, p. 418. People using the highways of a city at crossings where there is a greater amount of traffic, as appears to be the condition at this locality, have many things besides a moving car upon a track to observe and take into account in order to avoid receiving injuries from other sources, or inflicting injuries upon others; and hence we think

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it would be unreasonable to say as a matter of law that the pedestrian should look continuously up and down a track, or at a particular car, until he is upon or across the track. We think the better rule is that if the driver of a vehicle when he arrives at a street intersection sees an approaching car, and is reasonably justified in believing there will be sufficient time for him to cross the track before the car, if run at its usual and ordinary rate of speed, will reach the point of crossing, and he proceeds with reasonable diligence, then he cannot be said as a matter of law to be guilty of negligence in attempting to cross, and the question is one of fact for the jury, to be determined from all the evidence before it. *Omaha St. Ry. Co. v. Mathiesen*, 73 Neb. 820, 103 N. W. 666.

Now, recurring to the facts as developed by plaintiff's case, we find that, when the team arrived at the curb on the north side of Burnside street, the rear of the wagon was about 35 feet distant from the center of the north track, and the team was traveling at the rate of about six miles an hour. If the front of the car at the same time had been 70 feet distant, and it was traveling at 12 miles an hour, the collision that occurred might have been reasonably anticipated, providing one assumed, or had the right to assume, that the motorman would continue to speed his car across the intersection at that rate, without putting it under control. But, when the motorman approached the first crossing at the intersection of Burnside street and Seventh street, it was his duty to have his car under control, so as to avoid any possible collision, and that obligation must be considered just as binding upon him as any duty that the law imposes upon the plaintiff to stop or look. The people using the highways for lawful purposes have the right to rely in some measure upon the proper discharge of that duty. *Smith v. Street Ry. Co.*, 95 Minn. 254, 104 N. W. 16. But the facts appear to be that at the time the team entered or was at the intersection of the streets the car was distant from the point of contact about 140 feet, and neither plaintiff nor Harrigan observed that it was moving at an unusual or unlawful rate of speed. From these facts we cannot say, therefore, as a matter of law, that the car was so close that reasonable men would say that plaintiff and Harrigan, when proceeding on their way and attempting to cross the track, were not acting as reasonably prudent men should act under the circumstances, and the question was rightfully submitted to the jury.

Error is also claimed on the refusal of the court to give the following instruction: "It is not enough for a driver to look and listen for a car when he is some distance from the track without making any further effort to look or listen for a car, and, if a driver simply looks for a car when he is at a considerable distance from the track and then drives onto the same without taking any further precaution, he is not in the exercise of ordinary

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care." What we have already said with reference to the law of contributory negligence disposes of this question against the defendant's contention. But, even if the law were otherwise than has been stated as to the duty to continue to look, we are of the opinion that the facts assumed as to the basis of the requested instruction are too uncertain and indefinite upon which to base a definition of ordinary care. What the terms "some distance" and "considerable distance" mean to one man might be entirely different to another, and would also mean different things under different circumstances. Moreover, this instruction confines the definition of what constitutes ordinary care to the determination of a single fact; whereas, it is the result of all surrounding circumstances. Whether plaintiff was negligent in not again looking must depend upon the attendant relative circumstances, part of which are found in the necessity of his position. As we have said, the driver of the vehicle has other duties besides continually watching for street cars. He must keep a lookout to avoid being struck by other vehicles of other qualities and kind, and before all he must be vigilant to avoid colliding with and inflicting injuries upon others. And, although the driver may have driven upon the track without looking a second time, yet if, when the motorman of the approaching car saw, or should have seen, a wagon going upon the track ahead of the car, and had sufficient time and space in which to stop the car and prevent the collision, and he failed to do so, his negligence is the sole proximate cause of the injury, and the driver's act, charged to be negligent, is not contributory thereto. Thompson on Contributory Negligence, §§ 240, 1451.

Error is also predicated upon the refusal of the court to give the following instruction: "Before you are warranted in allowing the plaintiff any damages for any alleged permanent injury or disability, you must be reasonably certain from a preponderance of the evidence that such permanent injury has been sustained and will continue and not merely that permanent injury is probable or possible." It is argued that the evidence concerning the alleged permanency of the injury received by the plaintiff is extremely unsatisfactory in counsel's view, and that defendant was entitled to a clear and well-defined instruction covering the degree of evidence necessary to establish the fact of permanent injury. Conceding this to be the fact, and, as also contended by the defendant, that a party to an action is entitled to have the jury instructed with reference to his theory of the case, when such theory is presented and supported by competent evidence (*Farmers' Nat. Bank v. Woodell*, 38 Or. 294, 61 Pac. 837, 65 Pac. 520), yet it is admitted in the brief that the matter included in the requested instruction was covered in the general charge, and we find upon examination thereof that the effect of the language used is fully as comprehensive and strong as that con-

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tained in the requested instruction, and to have given the latter would substantially be a repetition of the former.

The refusal to give one other instruction is also noted in the brief, and urged as an error. The instruction is too lengthy to be set forth here. It is sufficient to say that we have carefully examined the matter and the authorities cited by counsel in support of the contention, and we find that the principles of law contained in the requested instruction, and applicable to the case, were given in the general charge. The only matter not included in the general charge embraces some reasons upon which the law as given is supposed to be based, and not the substance of the law, and there was no error in the court refusing thus unreasonably to extend its instructions.

From these conclusions, we adjudge that the judgment shall be affirmed.

CHICAGO, R. I. & P. RY. CO. v. HAMILTON.

(Supreme Court of Arkansas, Nov. 29, 1909.)

[123 S. W. Rep. 379.]

Railroads—Crossing Accidents—Injuries—Jury Question—Contributory Negligence—Failure to Look and Listen.*—It is, as a rule, negligence as a matter of law to attempt to cross a railroad track at a public crossing without looking and listening for trains, and it is only in exceptional cases that the question is for the jury, one of which cases is where the person injured was induced to cross without taking such precaution by the act of the company's agents.

Railroads—Crossing Accidents—Injuries—Jury Question—Contributory Negligence.†—Where the crossing gates, in charge of a gateman, were raised when plaintiff reached defendant's main track, which was close to and parallel with the side track on which he was injured, plaintiff was not negligent as a matter of law in crossing without looking or listening for a train; the open gates being an invitation to cross and an assurance that the way was clear, whether the gateman was in sight or not.

Railroads—Crossing Accidents—Injuries—Contributory Negligence—Duty of Pedestrian.†—While one crossing a railroad track at a

*See first foot-note of *Garrison v. St. Louis, etc., Ry. Co.* (Ark.), 34 R. R. R. 543, 57 Am. & Eng. R. Cas., N. S., 543; third foot-note of *Wilkinson v. Oregon S. L. R. Co.* (Utah), 34 R. R. R. 360, 57 Am. & Eng. R. Cas., N. S., 360; second foot-note of *Cottle v. New York, etc., R. Co.* (Conn.), 34 R. R. R. 282, 57 Am. & Eng. R. Cas., N. S., 282; first foot-note of *Blodgett v. Central Vt., Ry. Co.* (Vt.), 33 R. R. R. 511, 56 Am. & Eng. R. Cas., N. S., 511.

†See first foot-note of *Slattery v. New York, etc., R. Co.* (Mass.), 34 R. R. R. 795, 57 Am. & Eng. R. Cas., N. S., 795; *Evansville & T. H. R. Co. v. Berndt* (Ind.), 34 R. R. R. 535, 57 Am. & Eng. R. Cas., N. S., 535; *Lundergan v. New York & H. R. Co.* (Mass.), 34 R. R. R. 344, 57 Am. & Eng. R. Cas., N. S., 344.

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public crossing may rely upon the assurance that the way is safe, implied from the crossing gates being open, and cross without looking or listening, he cannot proceed blindly and refuse to see or hear obvious dangers.

Railroads—Crossing Accidents—Injuries—Burden of Proof—Contributory Negligence.—The burden being on the railroad company, in an action for injuries at a highway crossing, to show contributory negligence by not looking or listening before crossing, it was not entitled to an instruction making plaintiff negligent for not looking and listening until it showed a state of facts which made the failure to look and listen negligence as a matter of law.

Railroads—Crossing Accidents—Sufficiency of Evidence—Contributory Negligence.—In an action against a railroad company for injuries at a highway crossing, evidence held to sustain a finding that plaintiff was not negligent.

Appeal from Circuit Court, Garland County; W. H. Evans, Judge.

Action by Al Hamilton against the Chicago, Rock Island & Pacific Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Thomas S. Buzbee and John T. Hicks, for appellant.
Greaves & Martin, for appellee.

McCULLOCH, C. J. This is an action instituted by plaintiff, Al Hamilton, against the Chicago, Rock Island & Pacific Railway Company, to recover damages for personal injuries. He was awarded damages in the sum of \$950, and the defendant appealed to this court.

The injury occurred near the railway station in the city of Hot Springs. The main track runs east and west along Benton street. There is also a side track, and a spur track running off from the side track to a brewery depot near by. These tracks cross Cottage street, which runs north and south and intersects Benton street at right angles. The precise distance between these three tracks is not shown in this record; but it is evident that they are very close together. Plaintiff was struck and seriously injured by a moving car as he was crossing the spur track which runs off to the brewery depot. He lived in the city of Hot Springs, and was on his way from his home to his working place in another part of the city. He came up the east side of Cottage street, and when he reached the crossing of the main track he looked and listened for a train, but, according to his statement on the witness stand, he neither saw nor heard any moving engine or cars. This was very early in the morning, either before or just about daybreak. There were gates at the main track which were then open, and the plaintiff proceeded to cross the tracks. A box car was standing on the side track, and extended

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partly over into Cottage street, so that plaintiff had to walk around the end of it. He had nearly crossed the spur track when a moving car struck him and knocked him down. He says that he did not again look or listen at the time he started across the spur track. A freight train was then being made up, and cars were being switched about in making up the train. There is testimony on the part of several witnesses which, if believed, establishes the fact that the car which struck plaintiff was kicked on and down the spur track. This view must have been accepted by the jury, though the engineer and other trainmen testified that the car was being pushed onto that track and was attached to the engine at the time plaintiff was injured.

The court, at the request of plaintiff, and over the objection of defendant, gave the following instruction: "(6) It is not negligence in every case for the traveler to fail to look and listen for the approach of trains. Ordinarily this is the rule, but that is not required in every case. It is for the jury to determine, from the circumstances and facts in this case, whether the conditions existing at the time of the accident were such that an ordinarily prudent person might not have expected a train or cars to pass along at that particular time. It is the duty of the jury to consider the incident in the light of the circumstances as they appeared to the plaintiff at the time, and then to say by your verdict whether the plaintiff was guilty of such imprudent and negligent conduct as caused the injury." The court also refused the request of defendant to give an instruction telling the jury that: "It is the duty of foot passengers crossing the defendant's spur track to look and listen for trains, or cars, or engines that may cross said street, and, if necessary, to stop until such train or cars or engine shall have crossed said street, and if you find in this case that the plaintiff failed to look and listen for said train or cars, and, by reason of his failure to stop before going upon defendant's track, the plaintiff received injuries as alleged in his complaint, the defendant would not be liable." The rulings of the court in giving the above-quoted instruction requested by the plaintiff, and in refusing that asked by the defendant, are assigned as errors. The question presented is whether or not it was the duty of the court, under the testimony in this case, to give an instruction telling the jury that it was the absolute duty of the plaintiff to look and listen before he attempted to cross the spur track, and that he was, as a matter of law, guilty of contributory negligence if he failed to do so.

In *Tiffin v. St. L., I. M. & S. R. Co.*, 78 Ark. 55, 93 S. W. 564, we announced the oft-repeated and well-established rule that "it is negligence for one approaching a railroad crossing to fail to look and listen for the approach of trains, and that only in exceptional cases is it proper to submit to the jury the question whether or not the failure to exercise such caution is negligence."

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We undertook in that case to classify the exceptions to that rule, and, among others, stated the following as one of the exceptions: "Where the direct act of some agent of the company had put the person off his guard, and induced him to cross the track without precaution." Now the evidence in the present case shows that when the plaintiff reached the main track, which was only a short distance from and ran nearly parallel with the spur track on which he was injured, he found open or raised the gates, which were placed there, in charge of a gateman or watchman, to keep passengers from attempting to cross when trains or cars were passing. This was an invitation to a passenger, or an assurance to him that the way was clear and that he might proceed in safety. Whether or not it constituted negligence for him to cross without taking the further precaution or looking or listening was a question for the jury to determine under all the circumstances of the case, for, when the plaintiff attempted to cross, upon the invitation of the company's agent and under the implied assurance that it was safe for him to do so, it cannot be said as a matter of law that he was guilty of negligence in failing to look or listen for danger. This exception to the general rule has been repeatedly recognized by text-writers and by the adjudged cases. 3 Elliott on Railroads, § 1157; N. E., etc., R. Co. v. Wanless, L. R. 7 E. & I. App. Cas. 12; Evans v. L. S., etc., R. R. Co., 88 Mich. 442, 50 N. W. 386, 14 L. R. A. 223; Glushing v. Sharp, 96 N. Y. 676; Railway Co. v. Schneider, 45 Ohio St. 678, 17 N. E. 321; Wilson v. N. Y., etc., Ry. Co., 18 R. I. 491, 29 Atl. 258; Merrigan v. B. & A. R. R. Co., 154 Mass. 189, 28 N. E. 149.

The earliest case on this subject to which our attention has been directed is that of N. E., etc., R. R. Co. v. Wanless, *supra*. Lord Cairns, delivering an opinion in that case, said: "It appears to me that the circumstance that the gates at this level crossing were open at this particular time amounted to a statement, and a notice to the public, that the line at that time was safe for crossing, and that any person who, under those circumstances, went inside the gates, with the view of crossing the line, might very well have been supposed by a jury to have been influenced by the circumstance that the gates were open. * * * It appears to me that there was evidence to go to the jury to which weight might have been given, and from which the jurors might have been led to conclude that he (the injured person) was there in consequence of the circumstance I have referred to, viz., the gates being open; and, that being the only point for the court to consider, I certainly am of opinion that the court could not do otherwise than hold that the question of negligence might upon this evidence be rightfully submitted to the consideration of the jury." The Supreme Court of Ohio, in the case cited above, said: "Persons approaching such crossings have

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the right to presume, in the absence of knowledge to the contrary, that the gatemen are properly discharging their duty, and govern themselves accordingly, and it is not negligence on their part to act on the presumption that they are not exposed to dangers which can arise only from a disregard by the gatemen of their duties; and hence, when the gates are open and the gatemen present, they are entitled to assume that the tracks are clear and it is safe to cross." In *Gushing v. Sharp*, *supra*, the court said: "We think the case as to plaintiff's negligence was properly submitted to the jury. He looked both ways, and whether, under all the circumstances, he should have looked again or continued to look, was for the jury to determine. The raising of the gate was a substantial assurance to him of safety, just as significant as if the gatemen had beckoned to him or invited him to come on, and that any prudent man would not be influenced by it is against all human experience. The conduct of the gateman cannot be ignored in passing upon plaintiff's conduct, and it was properly to be considered by the jury with all the other circumstances of the case."

We do not mean to hold that the open gates, though they operated as an invitation to the plaintiff to proceed across the track, thereby absolved him from the exercise of due care for his own safety. The jury might have found that, notwithstanding this invitation, the exercise of ordinary care demanded that he should look and listen for approaching trains; but, under these circumstances, it was for the jury to say whether it was negligence to proceed without observing these precautions. A traveler, while crossing a railroad track upon an invitation of the company's servants, has a right to rely, by reason of the invitation, upon the presumption that the way is clear and free from danger; but he cannot, without bringing himself under a charge of negligence, put it beyond his power to discover danger. He cannot close his eyes and proceed blindly, nor stop up his ears so that he cannot hear. *Railway Co. v. Cleere*, 76 Ark. 377, 88 S. W. 995; *Railway Co. v. Tomlinson*, 69 Ark. 489, 64 S. W. 347. But in acting upon an invitation to cross the tracks it cannot be said as a matter of law that he is guilty of negligence because he fails to look up and down the track or to listen for approaching trains.

It is insisted that the testimony in the present case shows that the gates were raised and stood open because, under the custom there, they were not attended during the night, and that the gateman had not arrived at that early hour in the morning for the purpose of taking charge of the gates. The record does not, however, sustain this contention. There is one witness, one of the trainmen, who said, after some equivocation, that he thought it was too early for the gateman to get down for the purpose of

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guarding the gates. There is no evidence at all that the gates were usually attended during certain hours, or that the plaintiff was apprised of this custom. It is shown by the testimony of many witnesses that there was a great deal of crossing by footmen at this particular place, and that at this particular time in the morning it was a very busy place. The plaintiff was accustomed to pass there on the way to his work, about this time every morning. It nowhere appears that the gateman was absent during any particular hours, or that he took charge of the gates at any particular time. The bare fact stands in the record that when the plaintiff approached the crossing the gates were raised, that he looked and listened for danger, and, neither seeing nor hearing any, proceeded through the gates and across the tracks. The burden of proof was upon the defendant to establish contributory negligence, and, before it was entitled to an instruction placing upon the plaintiff the absolute duty of looking and listening, it devolved on the defendant to show a state of facts which, as a matter of law, constituted negligence for him to fail to look and listen. There might be a difference if it was shown that the gateman had not reached his post for the day, and that the plaintiff was aware of that fact. Under such circumstances, he could not, of course, accept the open gateway as an invitation to enter; but, as before stated, this state of facts does not appear in the record. The fact alone that the gateman was not in sight does not change the rule, for the open gateway was an invitation of itself, whether the gateman was in sight or not. The evidence in this case was sufficient to warrant the jury in finding that the servants of defendant were guilty of negligence in kicking the car down the spur track and across a street frequented by footmen, and in failing to put a light or keep a lookout on the moving car. The evidence was also sufficient to warrant a finding that the plaintiff was not guilty of contributory negligence.

It is not contended that the assessment of damages is excessive.

Judgment affirmed.

SOUTHERN RY. CO. v. CRAWFORD.

(Supreme Court of Alabama, Dec. 16, 1909.)

[51 So. Rep. 340.]

Negligence—Pleading—Defining Quo Modo Thereof—Necessity.—Where the gravamen of a complaint is the alleged misfeasance or nonfeasance of another, it is unnecessary to define the quo modo of the negligence.

Railroads—Accidents at Crossings—Action for Injuries—Pleading Negligence.—A count in a complaint against a railroad company for personal injuries in a collision with an engine at a highway crossing alleged that defendant negligently ran an engine towards the pike along which plaintiff was driving, thereby causing plaintiff's team to become frightened and run across the track in front of the engine, where it was struck. Held sufficient, though it did not allege the particulars of defendant's negligence.

Railroads—Accidents at Crossings—Actions for Injuries—Pleading Negligence.—A count differing from the above only by an additional averment that the engine was run "at a rapid rate of speed" was not defective under the rule that the sufficiency of a complaint for personal injuries, which undertakes to define the particular negligence which caused the injury, must be tested by the special allegations in that respect.

Railroads—Accidents at Crossings—Negligence—Violation of Statute—Failure to Give Signals.*—The failure to blow the whistle or ring the bell before reaching a highway crossing, as required by Code 1907, § 5473 (Code 1896, § 3440), is itself negligence, but, to be actionable, it must be the efficient proximate cause of injury.

Negligence — Actionable Negligence — Proximate Cause.†—Negligence, to be actionable, must be the efficient proximate cause of injury.

Railroads—Accidents at Crossings—Signals to Travelers—Object of Statutory Regulation.—The object of Code 1907, § 5476 (Code 1896, § 3443), requiring an engineer to whistle or ring the bell, is to put a traveler on his guard.

Railroads—Operation of Trains—Frightening Horses on Highway—Ground of Liability—Wanton Acts.‡—The authority to operate a

*See second foot-note of *Conway v. Louisville & N. R. Co.* (Ky.), 34 R. R. R. 313, 57 Am. & Eng. R. Cas., N. S., 313; first foot-note of *Dyson v. Southern Ry. Co.* (S. Car.), 33 R. R. R. 486, 56 Am. & Eng. R. Cas., N. S., 486.

†See last foot-note of *Conway v. Louisville & N. R. Co.* (Ky.), 34 R. R. R. 313, 57 Am. & Eng. R. Cas., N. S., 313; foot-note of *Chittick v. Philadelphia R. T. Co.* (Pa.), 34 R. R. R. 278, 57 Am. & Eng. R. Cas., N. S., 278; third foot-note of *Yeates v. Illinois Cent. R. Co.*, 34 R. R. R. 65, 57 Am. & Eng. R. Cas., N. S., 65.

‡See first foot-note of *Weller v. Lehigh Valley R. Co.* (Pa.), 33 R. R. R. 313, 56 Am. & Eng. R. Cas., N. S., 313; foot-note of *Hoag v. South Dover Marble Co.* (N. Y.), 31 R. R. R. 224, 54 Am. & Eng. R. Cas., N. S., 224.

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railroad includes the right to make a noise incident to operation of its engines, as in the escape of steam, the rattling of cars, and also to give the usual warnings of danger, as by sounding whistles and ringing bells, and a railroad company is not liable for injuries, occasioned by horses on the highway taking fright at noises made in the reasonable exercise of such rights and duties, but if the acts of employees causing such fright, are wanton and malicious, and are done in discharge of their business by using its appliances, such as wanton whistling of the engine and reckless discharge of steam, it will be liable.

Railroads—Accidents at Crossings—Efficient Cause of Injury—Failure to Whistle or Ring Bell.§—Failure to observe Code 1907, § 5473 (Code 1896, § 3440), by whistling or ringing the bell before reaching a highway crossing, is to be treated as the efficient cause of injury to a traveler along the highway, who, in absence of a signal, goes so near the track that an approaching train frightens his team, though there be nothing unusual in its operation.

Railroads—Accidents at Crossings—Actions for Injuries—Pleading—Negligence as Efficient Cause.—A count in a complaint for injuries to a traveler at a highway crossing did not charge that the operation of the engine immediately at the crossing was unusual or in any respect negligent, but the negligence relied on was the engineer's failure to whistle or ring the bell at least one-fourth of a mile before reaching the pike, as required by Code 1907, § 5473 (Code 1896, § 3440), "in consequence of which failure," the count continued, "plaintiff approached the crossing without warning of danger," and alleged that his team became frightened and ran on the track in front of the engine. Held to show a connection between the alleged negligence and the injury in the character of cause and effect.

Railroads—Accidents at Crossings—Duty of Traveler—Control of Team.||—Until a traveler at a crossing becomes aware of an approaching train, it is not his duty to leave his vehicle and go to the head of his team to be in a better position to control it.

Railroads—Accidents at Crossings—Action for Injuries—Question for Jury.—In a suit for injuries to a traveler at a highway crossing, evidence held insufficient to present a question for the jury as to negligence in the rapid speed of a train.

Appeal from Circuit Court, Madison County; D. W. Speake, Judge.

Action by W. B. Crawford against the Southern Railway Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

§See foot-note of *Barton v. Southern Ry. Co.* (Ga.), 33 R. R. R. 516, 56 Am. & Eng. R. Cas., N. S., 516; *Skipworth v. Mobile & O. R. Co.* (Miss.), 32 R. R. R. 697, 55 Am. & Eng. R. Cas., N. S., 697.

|For the authorities in this series on the subject of the contributory negligence of those injured by reason of teams being frightened by trains or cars, see foot-note of *Potter v. Pennsylvania R. Co.* (Pa.), 30 R. R. R. 443, 53 Am. & Eng. R. Cas., N. S., 443.

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Paul Speake, for appellant.

Walker & Spragins, for appellee.

SAYRE, J. Appellee sued for injuries to his person and property sustained by collision with an engine at a public road crossing. Count 1 alleges that the defendant by its servants negligently ran an engine towards the pike along which plaintiff was driving, thereby causing plaintiff's team to become frightened and run across the track in front of the engine, where it was struck, with the result complained of. It has become too well established by repeated decisions to need further discussion that, where the gravamen of the complaint is the alleged misfeasance or nonfeasance of another, it is not necessary to define the *quo modo* of the negligence; the reasonable theory being that the defendant is best informed as to the particulars of his own dereliction. *L. & N. R. R. Co. v. Marbury*, 125 Ala. 237, 28 South. 438, 50 L. R. A. 620; *Armstrong v. Montgomery St. Ry. Co.*, 123 Ala. 233, 26 South. 349.

Count 4 differs from count 1 only in that it qualifies the allegation that the "defendant negligently ran an engine" by the additional averment that the engine was run "at a rapid rate of speed." It is not to be declared defective under the rule that the sufficiency of a complaint, in an action for personal injuries, which undertakes to define the particular negligence which caused the injury, must be tested by the special allegations in that respect. In other words, the allegation that the train was run at a rapid rate of speed is not put in apposition to a general charge of negligence. Rather the act particularly alleged to have been done is characterized generally as having been negligently done; this characterization supplying every element necessary to make the rapid running of a train negligent. Thus, to illustrate from our adjudicated cases, it has been held that the mere allegation that a passenger is injured by the sudden jerk of a car does not show actionable negligence. Something must be alleged in addition. Negligence in such a case depends upon whether there are persons in such a position that a sudden start would probably cause injury, and the duty to know that fact. *Mobile L. & R. Co. v. Bell*, 153 Ala. 90, 45 South. 56. But in *H. A. & B. R. R. Co. v. Miller*, 120 Ala. 535, 24 South. 955, it was held that the averment of a count that "the engineer of said engine negligently caused or allowed said car and engine to be suddenly and violently shocked" sufficiently alleged a cause of action. There are conditions under which it may constitute negligence to maintain a rapid rate of speed in the movement of a railroad train; and those conditions are supplied in the count by the averment that defendant's train was negligently moved at a rapid rate of speed. The count was unobjectionable under our system of pleading.

Count 2 does not charge that the operation of the engine immediately at the crossing was unusual or in any respect negligent.

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The negligence upon which the count goes is to be inferred from the failure of the engineer to blow the whistle or ring the bell at least one-fourth of a mile before reaching the pike, "in consequence of which failure," the count continues, "plaintiff approached the crossing without warning of the danger." This count, in common with the others, alleges that the plaintiff's team became frightened and ran upon the track in front of the engine. The duty to blow the whistle or ring the bell before reaching a public road crossing is imposed by statute, and it must be conceded that a mere failure constitutes negligence. Code 1907, § 5473; Code 1896, § 3440. But, in order for negligence to confer a right of action, it must be the efficient proximate cause of injury. The statute (Code 1907, § 5476; Code 1896, § 3443) makes railroad companies liable for all damage done to persons, or to stock or other property, resulting from a failure to comply with the requirements of the three preceding sections, and places the burden upon them to show compliance. There can be no doubt that the object in requiring the engineer to blow the whistle or ring the bell is to put the traveler on his guard. In *Stanton v. L. & N. R. R. Co.*, 91 Ala. 386, 8 South. 799, it was said that "it is the duty of trains, nearing a public crossing, to make such signals to warn persons approaching the track, that they may stop at a safe distance." It must be conceded, however, that the observation had no particular relevancy to any question presented by that case. It has been held by other courts having occasion to consider cases of the sort that statutes similar to ours are intended, among other things, to provide against the hazards of damage by frightening teams traveling along a highway towards a crossing by enabling their drivers to place them in such positions as will best guard against such injuries. It is held that the statutory signals enable travelers along the highway to take precaution against the danger of fright to be caused by the rush of the train immediately at the crossing. *People v. N. Y. C. R. R. Co.*, 25 Barb. (N. Y.) 199; *Norton v. Eastern R. R. Co.*, 113 Mass. 366; *Ransom v. Chicago, etc., R. R. Co.*, 62 Wis. 178, 22 N. W. 147, 51 Am. Rep. 718; *Mo. Pac. Ry. Co. v. Johnson*, 44 Kan. 660, 24 Pac. 1116. But the further conclusion is that the statutes impose no duty to give warning to those who do not intend to use the crossing. *L. E. & St. L. R. R. Co. v. Lee*, 47 Ill. App. 384; *E. T. V. & G. R. R. Co. v. Feathers*, 10 Lea (Tenn.) 103; *Reynolds v. Great Northern Ry.*, 69 Fed. 808, 16 C. C. A. 435, 29 L. R. A. 695. In *Southern Railway v. Williams*, 143 Ala. 212, 38 South. 1013, it was argued that section 3441 of the Code of 1896, imposing certain duties upon engineers and conductors where the tracks of two railroads cross each other at grade, was intended for the protection of trains in the use of railroad crossings, and of passengers, employees and other persons rightfully on such trains,

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and to confer a remedy for their benefit. In that case it appeared in the complaint that plaintiff's intestate was nearby, but was not upon the railroad upon which the defendant was operating its train, and was killed as the result of a collision between two trains. The argument against the complaint concluded that the plaintiff's intestate did not come within any class intended to be protected, and the defendant, therefore, owed him no duty in the observance of the law at the crossing, and in consequence the failure to observe the precautions required by the statute constituted no act of negligence as to him. The court in an opinion written by the present Chief Justice, following the analogy afforded by the case of *A. G. S. R. R. Co. v. Chapman*, 80 Ala. 615, 2 South. 738, held that the statute enured to the benefit of any one who happened lawfully to be within the zone of danger created by a nonobservance of that statute. In *Stanton v. L. & N. R. R. Co.*, *supra*, the complaint was that the plaintiff had been injured by wrongfully obstructing the public road crossing over defendant's railroad, and running another train over the crossing while so obstructed by the first. It must be noticed that no negligence was charged in the running of the second train. The gravamen of the complaint was the obstruction of the road. The facts were that the plaintiff traveling in a buggy along the public road came to a crossing of defendant's track. A train of cars there obstructed his further progress for a half hour or more. While plaintiff waited, a second train came along on a side track "blowing off steam, and making unusual noise." At the approach of this train, plaintiff's horse became frightened and ran away, injuring plaintiff and his buggy. It was held that the fright of the horse and its running away was not the natural consequence of permitting the cars to remain on the crossing, and that the damages resulting from the fright of the horse were too remote, as a consequence of the obstruction of the public road, to be visited upon the defendant company for that cause. In that case it was further held that the authority to operate a railroad includes the right to make the noise incident to the movement and working of its engines, as in the escape of steam, and the rattling of cars; and also to give the usual and proper admonitions of danger, as in the sounding of whistles and the ringing of bells. It is not liable for injuries occasioned by horses, when being driven on the highway, taking fright at noises occasioned by the lawful and reasonable exercise of these rights and duties. But, if the acts of the servants occasioning the fright are wanton and malicious, and are done in the discharge of their business, by using the appliances of the company, such as wanton whistling of the engine, and the reckless discharge of steam, the company will be liable. Authorities were cited to sustain these propositions, and their soundness cannot be questioned. The negligence charged in the instant case was

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the failure to give a signal by blowing the whistle or ringing the bell. No other or different character of negligence is charged. **F**righ of plaintiff's team is alleged to have stood in the chain of causation leading from this failure to plaintiff's injury as an efficient cause. Still another intervening cause was necessary, of course, because in the nature of things the fright of the team could not have been caused by the failure to make a noise. The effort in the complaint, confessing, because not denying, that the train was operated without unusual noise, is to supply the missing link by alleging that the presence of the team so near the track as to be frightened by the ordinary operation of the train was due to the failure to blow the whistle or ring the bell. It may seem that the connection between the failure to give a signal of approach with what is alleged to have subsequently happened to the plaintiff and his team is slight and conjectural. Still it seems now that the failure to observe the statutory regulation is to be treated as the efficient cause of injury to a traveler along the highway who, in the absence of the signal, goes so near the track of a railroad that an approaching train causes his team to become frightened, though there be nothing out of the usual in the operation of the train. Such is the intended and necessary result of the statute. On second thought, and on further consideration of the cases decided by this court and referred to hereinabove, we do not feel warranted in holding that a connection, in the character of cause and effect, is not shown by the complaint, though at first we thought otherwise.

Pleas 9 and 10 predicate contributory negligence of the plaintiff for that under the circumstances there averred he failed to go to the head of his team and thus control it. Whatever may have been the duty of plaintiff in respect to stopping, looking, and listening—a feature of the case fully covered by other pleas upon which issue was joined—it cannot be said that the duty of quitting his place in his vehicle and going to the head of his team, in order that he might be in a better position to control it, devolved upon him until he became aware of the approach of the train. These pleas fail to aver plaintiff's knowledge of the approach of the engine, and were defective for that reason. The demurrers to them were properly sustained.

There was no evidence of any negligence in the operation of the engine in the immediate vicinity where the injury occurred except the evidence which went to show a failure to give the statutory signals. There was nothing out of the usual in the operation of the engine at that point, nor was the engineer negligent after he discovered plaintiff's peril. No conditions were shown which made a rapid rate of speed in advance of the discovery of plaintiff's dangerous situation negligent. For these reasons, the defendant was entitled to have the general affirmative charge as to count four. But it was open to the jury to

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find that the signals had not been given, and to infer that plaintiff had been led by the omission into a place of danger. On the other hand, there is no doubt under the evidence that the fright of plaintiff's team was a cause without which his injury would not have happened. He was advised of the approach of the engine in ample time to have avoided the collision but for the fact that his team became frightened, and carried plaintiff, notwithstanding his effort to control them, upon the track immediately in front of the engine. On the pleading and the proof as they were, it was for the jury to say whether there had been omission of the statutory signal, and whether the plaintiff had been guilty of contributory negligence as alleged. We do not think it necessary to consider other assignments of error. They will hardly recur in the exact form in which they are now presented.

Reversed and remanded.

DOWDELL, C. J., and ANDERSON and McCLELLAN, JJ., concur.

ILLINOIS CENT. R. CO. v. DUPREE.

(Court of Appeals of Kentucky, May 25, 1910.)

[128 S. W. Rep. 334.]

Railroads—Injuries to Persons at Crossings—Negligence—Evidence.—A child suing a railroad for injuries received by being struck by a train at a public crossing must show that the negligence of the railroad was the proximate cause of the injury complained of, though she was too young to be guilty of contributory negligence.

Railroads—Injuries to Persons at Crossings—Negligence—Failure to Give Signals.*—The failure of a railroad to ring the bell on the approach of a train to a public crossing is not negligence towards a person struck by a train at the crossing who knew that the train was approaching, and yet suddenly ran in front of the train.

Railroads—Injuries to Persons at Public Crossings—Negligence.†—Trainmen approaching a public crossing need not anticipate that a child accompanied by a nurse will leave her place of safety and run in front of the train, but, until it becomes reasonably apparent to them that she intends to cross, they may presume that the child will remain in the place of safety.

*See second foot-note of *Alabama G. S. R. Co. v. Hanbury* (Ala.), 34 R. R. R. 321, 57 Am. & Eng. R. Cas., N. S., 321.

†For the authorities in this series on the subject of the right to presume that a child seen on or near a railroad will avoid danger from train or street car, see first foot-note of *Southern Ry. Co. v. Smith* (Ala.), 33 R. R. R. 446, 56 Am. & Eng. R. Cas., N. S., 446.

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Railroads—Injuries to Persons at Public Crossings—Negligence.†

—A child five years old stood with her nurse in a place of safety on a railroad crossing. She knew that a train was approaching, but she darted across the track immediately in front of it. The trainmen on discovering her danger attempted to prevent injuring her, but were unable to do so. Held, that the fact that the train was running at a high rate of speed was not actionable negligence.

Nunn, J., dissenting.

Appeal from Circuit Court, Fulton County. "To be officially reported."

Action by Artie Dupree, by Joe Dupree, her next friend, against the Illinois Central Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Trabue, Doolan & Cox, Carr & Carr, and Robbins & Thomas, for appellant.

Shelbourne & Smith, for appellee.

CLAY, C. Artie Dupree, a child five years of age, while attempting to cross appellant's railroad tracks at a public crossing known as "Meadows Crossing," in the city of Fulton, Ky., was run over by a freight train, and her feet so crushed that amputation became necessary. Suing by her next friend, Joe Dupree, she brought this action against the Illinois Central Railroad Company to recover damages. The jury awarded her \$2,000. The railroad company appeals.

The sole ground urged for reversal is the failure of the trial court to award appellant a peremptory instruction. Just previous to the accident, Artie Dupree and her sister, a child one year younger, who were in charge of a negro nurse 15 years of age, were standing near the track on which the accident occurred. Between them and the latter track was another track. Thus they were about 12 or 15 feet distant from the track where the injury took place. While thus standing, a freight train, consisting of an engine, caboose, and one car, approached the crossing. When the engine reached the middle of the street, Artie Dupree broke away from her nurse, and started to cross the track immediately in front of the engine. According to the weight of the evidence, she got across the first rail, but stumbled upon the second rail. The front wheels of the engine passed over her feet. Upon the pilot of the engine were two of appellant's employees. One of these attempted to catch the child, but failed to do so.

†See foot-note of *Cincinnati, etc., Ry. Co. v. Chavasse's Adm'r* (Ky.), 34 R. R. R. 564, 57 Am. & Eng. R. Cas., N. S., 564; third foot-note of *Fleener v. Oregon S. L. R. Co.* (Idaho), 34 R. R. R. 513, 57 Am. & Eng. R. Cas., N. S., 513; third foot-note of *Russell v. Oregon R. & Nav. Co.* (Ore.), 33 R. R. R. 497, 56 Am. & Eng. R. Cas., N. S., 497.

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As the engine approached the crossing, the engineer saw the nurse and two children standing in a place of safety. When the engine reached the middle of the street, at a point 18 or 20 feet from where the nurse and children were standing, the engineer saw the child break away from the nurse and start across the track. He immediately applied the emergency brakes, and did everything in his power to prevent the injury. At the place of the accident there was a plank crossing over the railroad tracks, and the accident occurred about 8 or 10 feet from the crossing. There was evidence to the effect that the engine bell was not rung as the train approached. There was also evidence to the effect that the train was going pretty fast. No witness for appellee, however, attempted to give the rate of speed. In speaking of the rate of speed they use such expressions as "fast," "very fast," and "pretty fast." The evidence for appellant is to the effect that the bell was being rung, and that the train was traveling at the rate of about five miles an hour. The engineer also testified that he succeeded in stopping the engine within 30 or 40 feet from where the child started to cross in front of it, and that it was impossible to stop any sooner. The principal witness for appellee on the question of how the accident occurred is Ardella Freeman, the colored nurse, who was in charge of appellee and her sister. She testified that she was with Artie Dupree and her sister at the time Artie was injured. The train was running fast. She did not hear any ringing of the bell or blowing of the whistle. When the engine was about halfway across the street, Artie took a running spell. She said, "Ardella, let's go on this side. Look, let's go over here." She attempted to grab Artie, but missed her. When Artie started across, she ran as fast as she could. At the time of the accident she and the children were standing still. Both she and Artie saw the train approaching; didn't remember whether or not Artie stumped her toe. She fell, however, and was injured. The front wheels of the engine ran over her.

Counsel for appellee argue that, inasmuch as there was evidence tending to show negligence on the part of appellant in failing to ring the bell and in running at a fast rate of speed, appellee was entitled to have the case submitted to the jury, because she was entirely too young to be guilty of contributory negligence. It may be admitted that the child was too young to be guilty of contributory negligence, but in making out her case it was necessary, not only to show negligence on the part of appellant, but negligence that was the proximate cause of the injury complained of. It becomes necessary, then, to consider the facts from this standpoint. Manifestly, the failure, if any, on the part of appellant's agents to ring the bell, played no part in the matter. The purpose of ringing the bell is to give those on or near the track warning of the approach of the train. The evi-

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dence before us clearly discloses the fact that the child knew the train was approaching, and that this was the reason she took a sudden notion to cross the track. It was not negligence, then, to fail to apprise her of that which she already knew.

The only remaining question is whether or not appellant is responsible because there was evidence tending to show that the train was running very fast. It may be admitted that if the child had been standing on the track, or had gone upon the track when the train was some distance away, the speed of the train might have played some part in the accident. According to all the proof, however, the child darted across the track immediately in front of the engine. Those in charge of the engine could not have anticipated that the child, who was in a place of safety, would suddenly take a notion to run across the track immediately in front of the engine. They had a right to assume that she would remain in a place of safety until it became reasonably apparent that she intended to cross the track. When she did start across the track, everything was done that could have been done to avoid the injury. As she ran rapidly and immediately in front of the engine, it is immaterial whether the speed of the train was five, ten, or fifteen miles an hour, for no power on earth could have stopped the train in time to avoid the injury. That being the case, the appellee failed to show that the negligence of appellant was the proximate cause of the injury complained of. On the contrary, all the evidence goes to show that appellee's injuries were the result of an unfortunate accident, for which appellant was in no wise responsible. Under these circumstances, we conclude that the trial court erred in failing to give a peremptory instruction in favor of appellant.

Judgment reversed and cause remanded for a new trial consistent with this opinion.

NUNN, J. I dissent for the reason that there was evidence that the bell was not rung and the train was being run very fast as it approached the child and in a city when it was the duty of appellant to ring the bell or blow the whistle and keep a lookout for persons, and to have the train under control so as to prevent injury to persons. See *I. C. R. R. Co. v. Murphy's Adm'r*, 123 Ky. 787, 97 S. W. 729, 30 Ky. Law Rep. 93, 11 L. R. A. (N. S.) 352.

ST. LOUIS & S. F. R. CO. v. CARR.

(Supreme Court of Arkansas, March 7, 1910.)

[126 S. W. Rep. 850.]

Railroads—Crossing Accidents—Care Required from Railroad.—A railroad company must exercise ordinary care in running its trains over a public highway crossing, and is not merely bound to avoid injuring a pedestrian thereon after discovering his peril.

Railroads—Crossing Accidents—Contributory Negligence—Care Required of Pedestrians.*—A pedestrian must use ordinary care to inform himself of the approach of trains on crossing a public highway crossing, in order to avoid injury.

Railroads—Crossing Accidents—Injuries—Negligence.—In view of Kirby's Dig. § 6773, making all railroads responsible for damages caused by the running of their trains, a railroad company is prima facie negligent where a pedestrian is injured at a public highway crossing by being struck by an object projecting from a passing train.

Railroads—Crossing Accidents—Actions—Jury Question.—Whether a railroad company was negligent in permitting an object to project from a passing train, so as to cause injuries to a pedestrian at a public crossing, is a question for the jury.

Railroads—Accidents on Track—Care Required.—A railroad company should exercise ordinary care, both at stopping points as well as at all reasonable times along the line, in inspecting its trains to discover and repair any defects in appliances, etc., which would permit projections from the train which might injure pedestrians along the track.

Negligence—Contributory Negligence.†—One must exercise ordinary care to avoid injury from danger arising from another's negligence, if an ordinarily prudent person would apprehend the existence of the danger.

Railroads—Crossing Accident—Contributory Negligence—Care Required.‡—While a pedestrian may, to a limited extent, rely upon the railway company's duty to use care in approaching a public highway crossing, he must exercise the care of an ordinarily prudent man for

*See first foot-note of second preceding case.

†See first foot-note of *Evansville, etc., R. Co. v. Berndt* (Ind.), 34 R. R. R. 535, 57 Am. & Eng. R. Cas., N. S., 535.

‡For the authorities in this series on the question whether a person injured though the act of another had the right to assume that the latter had performed or would perform the duties owing to the person injured, or whether it was the duty of the latter to anticipate negligence on the part of the other, see first foot-note of *Rundgren v. Boston & N. St. Ry. Co.* (Mass.), 32 R. R. R. 685, 55 Am. & Eng. R. Cas., N. S., 685; last foot-note of *Keefe v. Seattle Elec. Co.* (Wash.), 33 R. R. R. 725, 56 Am. & Eng. R. Cas., N. S., 725; *Norfolk & P. T. Co. v. Forrest's Adm'x* (Va.), 33 R. R. R. 472, 56 Am. & Eng. R. Cas., N. S., 472.

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his own safety; and, if he is struck by a projection from a passing train because of the want of such care, he cannot recover.

Negligence—Actions—Jury Question—Contributory Negligence.—What is contributory negligence depends upon the circumstances of each case; and, if reasonable men might differ as to whether the person injured exercised ordinary care for his own safety, the question is for the jury.

Trial—Instructions.—In an action against a railroad company for injuries by being run over by a train at a highway crossing, after being struck by a swinging object from a car, an instruction that, while plaintiff cannot recover if he did not use ordinary care for his own safety, he need not, in order to exercise ordinary care, anticipate negligence by defendant, but could presume that defendant would not be negligent, was erroneous as invading the province of the jury in authorizing a finding that plaintiff was not negligent, even though he might not have exercised that degree of care for his own safety that one of ordinary prudence would have exercised.

Railroads—Crossing Accident—Injury Action—Jury Question—Contributory Negligence.—In an action against a railway company for injuries by being run over by a train at a highway crossing, after being struck by a swinging object from a car, whether plaintiff was guilty of contributory negligence in going too close to the train held a jury question.

Railroads—Crossing Accident—Injury—Actions—Sufficiency of Evidence.—In an action against a railway company for injuries by being run over by a train at a highway crossing, after being struck by a swinging object from the car, evidence held to sustain a verdict for plaintiff.

Railroads — Crossing Accidents—Injuries—Actions—Instructions—Requests—Negligence.—In an action against a railroad company for injuries by being run over by a train at a highway crossing, after being struck by a swinging object from a car, a requested instruction that, if the cars were inspected 14 miles from the place of injury, which was the last stop prior thereto, and a car was out of condition at the time of the injury, but the trainmen had no knowledge of the defect, defendant would not be negligent was properly refused.

Appeal from Circuit Court, Crawford County; Jephtha H. Evans, Judge.

Action by W. B. Carr against the St. Louis & San Francisco Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

This was an action to recover damages for a personal injury which the plaintiff alleged he sustained at a public crossing over defendant's railroad track in the city of Ft. Smith, Ark. The plaintiff testified that about 10 o'clock on the night of January 22, 1909, he was traveling on foot along a public wagon road or street which ran across the defendant's railroad track in said

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city; that when he got to within about 30 feet of the track, he noticed a freight train going north along the crossing and towards the depot, which was about one mile from the crossing. He proceeded up nearer the crossing, and there stopped somewhat close to the track, and waited a few minutes for the freight train to clear the crossing so that he could pass over. There was a number of box cars in the train, and several of these passed by him as he stood waiting for the train to clear the crossing. He was on the west side of the track, and was looking towards the north, the direction in which the train was moving, when he heard a noise, and, turning, saw a door or other object projecting from the train; the door or projecting object struck him on the head before he could dodge it, and knocked him down, rendering him unconscious, and causing him to fall so that his legs were caught under the moving train. He was cut severely on the left side of his head, and his legs were injured to such an extent that they had to be amputated, one above, and the other below, the knee. Some time after the freight train had passed a passenger train arrived over this track from the south; and the employees, hearing his cries, went to his assistance and took him on the train. All the employees of the crew on the freight train testified that they did not see the plaintiff, and did not know that he was injured until long after the occurrence, when they were told of it. They also testified that the freight train had left Paris, Tex., a distance of about 160 miles from Ft. Smith, and that they had inspected the cars at every stopping place from that point, the last of which was 14 miles from Ft. Smith. They stated that there was no car in the train, from the last station, which had a swinging door, but that all the doors of the cars were upon slides, that when the cars were last inspected at the above station the doors were found in good condition, and that neither the doors nor any other object was projecting from any of the cars. No person other than the plaintiff testified to seeing the injury when it occurred.

At the request of the plaintiff the court instructed the jury, in substance, that if the plaintiff was at a crossing of a highway over defendant's track at Ft. Smith in the nighttime, intending to cross the track on the highway, and a train of defendant, going north, prevented him from doing so, and while waiting for the crossing to be cleared he was struck by a car door negligently left open and thereby injured, the plaintiff should recover if, at the time, he was exercising ordinary and reasonable care for his own safety, and instructed, in effect, that if the injury did not occur at a public crossing, the jury should find for defendant. The court at the request of plaintiff, amongst other instructions, gave the following: "(7) If plaintiff was wanting in ordinary and reasonable care for his own safety, and was thereby injured,

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he cannot recover; or, if the defendant was in the exercise of ordinary and reasonable care as herein defined, then plaintiff cannot recover. Plaintiff was not, however, in order to exercise ordinary care for himself, required to anticipate negligence on the part of defendant, if such negligence existed, but might presume that defendant would not be negligent." At the time of the giving of this instruction the defendant made a specific objection to the latter portion thereof. The defendant requested the court, amongst other instructions to give the following, which were refused: "(2) I charge you that a railroad company owes no duty to one walking on its track, or near its track, other than not to wantonly injure him after discovery. If you find from the evidence that the employees in charge of the freight train passed going north about 10:40 p. m. on January 22, 1909, did not see the plaintiff, you will find the issues for the defendant." "(10) If you find that the cars were inspected at Jensen, 14 miles from the injury, which was the last stop of the train before the injury, and found to be in perfect condition, and you further find that it was out of condition at the time of the injury, and you further find that none of the trainmen had any knowledge of any such defect, or of any break after such inspection and before the injury, then the defendant would not be guilty of any negligence." A verdict was returned in favor of the plaintiff, and the defendant prosecutes this appeal.

W. F. Evans and *B. R. Davidson*, for appellant.

Rowe & Rowe and *C. A. Starbird*, for appellee.

FRAUENTHAL, J. (after stating the facts as above). It is urged by counsel that the defendant had the right to use its tracks at the crossing, and that it only owed the duty to plaintiff not to injure him after having discovered his position of peril. But the rule relative to the liability of a railroad company for an injury done after a discovered peril is not applicable to the facts of this case, as adduced on the part of the plaintiff; for, according to the evidence of the plaintiff he was a traveler in a public highway at the crossing of the defendant's tracks, and in such case he was not a trespasser or licensee on defendant's right of way, but he had the right to use the highway crossing. It is true that the railway company had also the right to the use of its tracks over the highway crossing. Where the railroad is situated upon a highway, the public has the right to use the highway as well as the railroad, and each must make reasonable and proper efforts, with due regard to the rights of the other and in view of all the circumstances, to foresee and avoid collision. And in such a case it is the duty of the railroad company to exercise ordinary care and prudence in the operation of its trains, and otherwise, to prevent injuring a traveler. The traveler should observe all the requirements of ordinary care; to him the track

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itself is a warning of danger, and he is under the duty to exercise precaution to inform himself of the proximity of the train, and to exercise ordinary prudence in avoiding injury.

In the case of *St. L., I. M. & S. R. Co. v. Neeley*, 63 Ark. 636, 40 S. W. 126, 37 L. R. A. 659, the railway company was operating its freight train along a street in the town of Warren, and while the train was passing Neeley in the street a car door fell from its place in the car and injured him. In that case it was held that "the railroad company owed him the duty to employ reasonable care to avoid injuring him." In *St. Louis S. W. Ry. Co. v. Underwood*, 74 Ark. 610, 86 S. W. 804, a pedestrain along a street was injured by a railroad, and in that case the court said: "This doctrine rules the case at bar, rather than the principle invoked by appellant that the railway company owed appellee no duty except to use ordinary care not to injure him after having discovered his place of peril." 3 Elliott on Railroads, § 1153; 33 Cyc. 1145. And when at a public crossing a traveler in the highway is injured by a door or other object projecting from the car during the running and operation of the train, a prima facie case of negligence on the part of the railroad company is made out under section 6773, Kirby's Dig. *St. L., I. M. & S. R. Co. v. Neeley*, 63 Ark. 636, 40 S. W. 126, 37 L. R. A. 659; *Barringer v. St. L., I. M. & S. R. Co.*, 73 Ark. 548, 85 S. W. 94, 87 S. W. 814; *Railway v. Briggs*, 87 Ark. 581, 113 S. W. 644. A railroad company is bound to use ordinary care and caution to avoid injuring persons who may be near its tracks, and who are rightfully at such place; and whether or not under all the circumstances of the case the railroad company was negligent in permitting any object or article which caused the injury to project or fall from its train of cars is a question of fact for the jury to determine. *Kansas Pac. Ry. Co. v. Ward*, 4 Colo. 30; *Shearman & Redfield on Negligence* (3d Ed.) 477; 33 Cyc. 900. The railroad company should exercise ordinary care and diligence in inspecting its cars, trains, and appliances in order to discover such defects and to remedy and repair same. And it should use such care, not only at its stations or stopping points along its line, but such care should be exercised at all reasonable times along its route to discover such defects.

But although the railroad company may have been guilty in this case of negligence which caused the injury, still this did not absolve the plaintiff from the duty to exercise due and ordinary care to avoid the injury; for if he was guilty of any negligence which contributed to the injury sustained by him, he cannot recover. This contributory negligence of the plaintiff would consist in some act or omission on his part amounting to a want of ordinary care. In *Hot Springs R. Co. v. Hildreth*, 72 Ark. 573, 82 S. W. 245, it is held that ordinary care is such as a man of reasonable prudence and caution would exercise under the cir-

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cumstances, and "culpable negligence" is defined to be the "omission to do something which a reasonable, prudent, and honest man would do, or the doing something which such a man would not do under all the circumstances surrounding each particular case." Hot Springs R. Co. v. Newman, 36 Ark. 607. Where a danger is probable or obvious it is the duty of a person to exercise ordinary care to avoid the injury, even though the other part was negligent. And this duty to avoid the consequences of another's negligence arises whenever the circumstances are such that an ordinarily prudent person would apprehend their existence. The law requires the exercise of ordinary care to observe danger and avoid it.

As is said in the case of Southwestern Tel. Co. v. Beatty, 63 Ark. 65, 37 S. W. 570: "The fact that a street is a highway, and the appellee had the right to be in it, did not relieve him of the duty to exercise care to avoid the danger. If he was guilty of conduct which a reasonable and prudent man would not have adopted under the circumstances, and this conduct contributed directly to his injury, he was not entitled to recover." While a traveler at a public crossing over a railroad track may, to a limited extent, rely upon the railroad company to observe the requirements of ordinary care, nevertheless it is his duty, in approaching the crossing or in going on it, to exercise ordinary care, not only to learn of the approach of trains, but also in keeping out of the way of probable danger; that is, he must use such care and prudence as would be exercised by a man of ordinary care and prudence under like circumstances. He cannot by relying on the railroad company to exercise ordinary care blindly run into a train or place himself negligently in such close proximity to the train as to be injured. What will constitute contributory negligence on the part of the person injured must depend upon the circumstances of each case. If from those circumstances reasonable men might differ as to whether the person did or did not exercise ordinary care, the question must be left to the jury for its determination. The jury must then decide for themselves whether the person did any act which he should not have done, or omitted to do an act which in the exercise of ordinary care he should have done, under the circumstances of the case. The exercise of ordinary care might in the estimation of the jury require the person to look for any danger, even should it proceed from some negligent act of the defendant. The jury should be permitted to be the exclusive judges of what would be the exercise of ordinary care on the part of the plaintiff under all the circumstances of the case.

But by the above instruction No. 7, given on the part of the plaintiff, the court told the jury that in order to exercise ordinary care the plaintiff was not required to anticipate negligence

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on the part of the defendant; in effect, it said that the plaintiff, in regulating his conduct and acts under the circumstances of the case, might rely on the assumption that the defendant would not be negligent, and therefore need not use that care which the jury might have thought that an ordinarily prudent and careful person should have used under the circumstances of the case. By this instruction the jury might have thought that the plaintiff was not required to exercise that care and prudence which the jury would have considered ought to have been exercised by a man of ordinary care under the circumstances of this case; for, if the plaintiff had an absolute right to conform his acts to any course of conduct because he did not anticipate negligence on the part of defendant, then the jury may have thought, from this instruction, that the plaintiff was excused from some act of negligence on his part because he had the right to assume that defendant would not be negligent. But the law is to the contrary; and, although the defendant was negligent, still the plaintiff himself must not have been guilty of any act of negligence which contributed to the injury, before he can recover. It was under the evidence a close question of fact as to whether or not the plaintiff was guilty of negligence in going as close to the moving train as he did; and the determination of that question of fact should have been left to the jury without any qualification as to the care which the plaintiff should have exercised for his safety. By this instruction we think the court invaded the province of the jury, and therefore committed error, and that the error was prejudicial.

We have examined the other instructions that were given and refused in the case, and we do not find any prejudicial error in the rulings of the court thereon. There are other complaints made by appellant; but, if any of them amount to error, we do not think they will occur on a second trial. Under proper instructions we are of opinion that there was sufficient evidence to sustain the verdict of the jury.

For the error in giving the instruction No. 7 on behalf of plaintiff, the judgment is reversed, and the cause remanded for a new trial.

ILLINOIS CENT. R. CO. *v.* O'NEILL.

(Circuit Court of Appeals, Fifth Circuit, March 15, 1910.)

[177 Fed. Rep. 328.]

Evidence—Credibility of Witnesses—Determination.—In determining the credibility of witnesses, it is the jury's duty to consider their interest, their opportunity for observation, and the general circumstances surrounding the giving of their testimony.

Railroads—Crossing Accident—Death of Pedestrian—Negligence—Contributory Negligence—Burden of Proof.*—In an action for the death of a pedestrian in collision with a railroad train at a crossing, the burden is on plaintiff to establish defendant's negligence and that such negligence was the proximate cause of the death by a clear preponderance of the evidence, while the burden is on defendant to establish the defense of contributory negligence in the same manner.

Railroads—Crossing Accident—Death of Pedestrian—Negligence.*—In an action against a railroad company for death of a pedestrian at a crossing, the fact of the accident does not of itself show negligence.

Railroads—Crossing—Flagmen.†—A railroad company is not bound, in the absence of statutory requirement, to employ a flagman or watchman at a crossing, and its failure to do so is not negligence unless required by the exercise of reasonable care.

Railroads—Operation of Trains—Crossings—Signals—Speed.‡—Where a city ordinance limited the speed of trains within the city to

*For the authorities in this series on the question whether a presumption of negligence on the part of those in charge of the train or street car arises from the fact that a person is collided with at a railroad crossing, see third foot-note of *Garrison v. St. Louis, etc., Ry. Co.* (Ark.), 34 R. R. R. 543, 57 Am. & Eng. R. Cas., N. S., 543.

See last foot-note of *Evansville & T. H. R. Co. v. Berndt* (Ind.), 34 R. R. R. 535, 57 Am. & Eng. R. Cas., N. S., 535; first foot-note of *Popke v. New York, etc., R. Co.* (Conn.), 34 R. R. R. 375, 57 Am. & Eng. R. Cas., N. S., 375; first foot-note of *Lundergan v. New York Cent. & H. R. R.* (Mass.), 34 R. R. R. 344, 57 Am. & Eng. R. Cas., N. S., 344; *Cottle v. New York, etc., R. Co.* (Conn.), 34 R. R. R. 282, 57 Am. & Eng. R. Cas., N. S., 282.

†See last foot-note of *Schulte v. Louisville & N. R. Co.* (Ky.), 29 R. R. R. 203, 52 Am. & Eng. R. Cas., N. S., 203; *Russell v. Oregon R. & Nav. Co.* (Ore.), 33 R. R. R. 497, 56 Am. & Eng. R. Cas., N. S., 497; *Chesapeake & O. Ry. Co. v. Dandridge* (C. C. A.), 33 R. R. R. 489, 56 Am. & Eng. R. Cas., N. S., 489.

‡For the authorities in this series on the subject of negligence in running a train or street car in violation of a speed ordinance, see second foot-note of *Cleveland, etc., Ry. Co. v. Powers* (Ind.), 33 R. R. R. 563, 56 Am. & Eng. R. Cas., N. S., 563; first foot-note of *Dyson v. Southern Ry. Co.* (S. Car.), 33 R. R. R. 486, 56 Am. & Eng. R. Cas., N. S., 486; last foot-note of *Wilson v. Puget Sound Elect. Ry. Co.* (Wash.), 32 R. R. R. 311, 55 Am. & Eng. R. Cas., N. S., 311; *Henry v. Cleveland, etc., Ry. Co.* (Ill.), 32 R. R. R. 48, 55 Am. & Eng. R. Cas., N. S., 48; *Kern v. Des Moines City R. Co.* (Iowa), 32 R. R. R. 29, 55 Am. & Eng. R. Cas., N. S., 29.

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six miles an hour and required the ringing of the bell as crossings were approached, the operation of a train over a crossing at a speed exceeding six miles an hour and a failure to ring the bell, resulting in the death of a pedestrian at the crossing, constituted negligence.

Railroads—Crossing Accident—Death—Contributory Negligence.§
—While a railroad company is entitled to the right of way over a railroad crossing, a pedestrian is nevertheless entitled also to use the crossing, being first required to look and listen, and not to carelessly walk into danger, so that if he fails to look, or, looking, does not see the approaching train when it must have been visible to an ordinary observer, he would be guilty of contributory negligence precluding a recovery for injuries sustained.

Railroads — Crossing Accident — Last Clear Chance — Discovered Peril.||—A railroad company is liable for the death of a pedestrian at a crossing, notwithstanding his contributory negligence, if the operatives of the train in the exercise of reasonable care ought to have discovered decedent's danger in time to have saved him, and failed to do so.

Abatement and Revival—Action for Injuries—Survival.—An action for physical and mental pain and suffering, suffered by a person injured before his death, survives to decedent's widow and children.

Death—Measure of Damages.—In an action for the wrongful death of a husband and father, the damages to the widow and minor children, consisting of the loss of support, etc., must be determined by considering all the probabilities, the amount of decedent's earnings, and the probabilities of his continued health, etc.

Master and Servant—Injuries to Third Persons—Negligence—Incompetent Engineer.—The employment of an incompetent engineer resulting in a railroad crossing accident is negligence sufficient to justify a recovery if it was the proximate cause of the injury.

Negligence—Definition.||—"Negligence" is the omitting to do something that a reasonably prudent person would do, or the doing of something that such person would not do.

Death—Wrongful Death—Verdict.—In an action by a widow for herself and minor children for the wrongful death of her husband,

§See second foot-note of *Slattery v. New York, etc., R. Co.* (Mass.), 34 R. R. R. 795, 57 Am. & Eng. R. Cas., N. S., 795; fourth foot-note of *Wilkinson v. Oregon Short Line R. Co.* (Utah), 34 R. R. R. 360, 57 Am. & Eng. R. Cas., N. S., 360; *Lundergan v. New York Cent. & H. R. R. Co.* (Mass.), 34 R. R. R. 344, 57 Am. & Eng. R. Cas., N. S., 344.

||See last foot-note of *Garrison v. St. Louis, etc., Ry. Co.* (Ark.), 34 R. R. R. 543, 57 Am. & Eng. R. Cas., N. S., 543.

¶See first foot-note of *Langenfeld v. Union Pac. R. Co.* (Neb.), 34 R. R. R. 727, 57 Am. & Eng. R. Cas., N. S., 727; first foot-note of *Wilkinson v. Oregon Short Line R. Co.* (Utah), 34 R. R. R. 360, 57 Am. & Eng. R. Cas., N. S., 360; *Perryman v. Chicago City Ry. Co.* (Ill.), 34 R. R. R. 93, 57 Am. & Eng. R. Cas., N. S., 93.

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the father of the children, a verdict for plaintiff should be so divided as to find a specified sum for the widow and another specified sum for each minor child.

In Error to the Circuit Court of the United States for the Eastern District of Louisiana.

Action by Mrs. Mary O'Neill against the Illinois Central Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

The following is the charge of Foster, District Judge:

This is a case where the plaintiff sues for \$30,000 damages for the death of her husband and the father of her minor children—\$10,000 for each of them; and alleges, as a cause of action, the negligence of the defendant, setting it out under what I will term four general heads: First, the running of the train at an excessive rate of speed exceeding six miles per hour in violation of a city ordinance; second, having no flagman or watchman at the intersection of the streets, also in violation of a city ordinance; third, that the defendant failed to ring the bell or to blow the whistle or give any other signal; and, fourth, that the deceased was in full view of the engineer who had ample time to see him and to have stopped his train and avoided the accident and did not do so. The defense is a general denial and a plea of contributory negligence.

Now, gentlemen, you are the sole judges of the facts in this case. There has been very little conflicting testimony, and while I have a right to comment on the evidence it is not my intention to do so, further than to be of some assistance to you in arriving at a solution of the problem, and you are not bound in any way by my opinions as to what has been testified to; you are at liberty to disregard anything I say in regard to the evidence, and to draw your own conclusions from what you have heard. In determining the issues of fact, where there is conflict of testimony you must resolve those conflicts of testimony, you must try to resolve those conflicts so as to have all the witnesses speak the truth, but if you cannot do so then you will, of course, reject the evidence of those you do not believe, and you will give credence to the evidence of those you do believe. In determining who to believe you ought to take into consideration the interest that witnesses may have in the matter and the opportunity for observation that each of them had, and the general circumstances surrounding the giving of their testimony. The burden of proof is on the plaintiff to establish her case by a clear preponderance of the evidence, and the burden is on the defendant to establish its plea of contributory negligence.

Now, both the plaintiff and defendant must establish their respective—First, I should say the plaintiff must establish the negligence of the defendant by a preponderance of the evidence,

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and the defendant must establish the contributory negligence in the same way, but the defendant is not bound to put witnesses on the stand for the purpose. You are to judge both of these matters by all the evidence in the case, no matter by which side it is adduced. The mere fact that there was an accident does not of itself show negligence, and notwithstanding that the deceased in this case was certainly killed by defendant's train, that fact of itself does not establish the negligence of the defendant, and the plaintiff must still show you that the cause of death, the proximate cause of death, was the negligence of the defendant before she can recover. Now, if that is done, the question then arises as to the contributory negligence of the deceased. The defendant had the right of way at this crossing, and to that extent, perhaps, its right was superior to the deceased's, but the deceased also had the right to cross these railroad tracks at the intersection where he attempted to do so, and the mere fact he tried to cross the tracks was not of itself negligence. The defendant is not bound by law to employ a flagman at this intersection, or a watchman. The city ordinance introduced in evidence does not impose, in my opinion, that duty on the defendant. They were prohibited, apparently, by these same ordinances, from blowing a whistle to give warning of their approach, but they were required to ring a bell at intervals, how frequent the ordinance does not say. There is some conflict of testimony as to whether or not this bell was rung, and that is one of the points you will have to decide. Apparently there is no question about a flagman. It seems to be a fact that no flagman or watchman was provided, so if that is negligence as relied upon by the plaintiff, the fact itself is established.

Now, I charge you that while that defendant was not required by law to employ a flagman, the defendant was required to exercise all due and reasonable care for the protection of others who had the right to use that crossing consistent with the reasonable running of its trains, and it is for you to determine whether or not the failure to employ a flagman or watchman at that crossing was, or was not, violative of its duty. So it was the duty, imposed by law upon the defendant, not to exceed the rate of six miles an hour in running its trains. If you find that the defendant did not ring the bell, and that is a disputed question, it would be negligence. If you find that the train was running at a rate exceeding six miles an hour that would be negligence. Those two questions you have to determine. But the mere fact that the defendant may have been negligent would not entitle the plaintiff to recover unless the negligence resulted in the death of the husband of the plaintiff.

The defendant relies upon the plea of contributory negligence, and in determining that you have to consider the circumstances of the case as the evidence presents them. I charge you that the

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deceased was bound to look and listen before crossing the defendant's tracks, and not to carelessly walk into danger, and if he failed to look, or, looking, did not see the approaching train at a time when it must have been visible to an ordinary observer, it was negligence on his part, and in looking he was bound to look as a prudent and careful man would, and that is to take into consideration the track upon which a train might approach from both directions. So it would be negligence on his part if he failed to listen, or did not hear the bell when it was in fact ringing, or, seeing the train approaching walked in front of it thinking he had time to cross in safety when, as a matter of fact, he did not. You must determine these matters as questions of fact from all the evidence.

I charge you further that should you find that the defendant was negligent, and the negligence of the defendant caused the death of the husband of the plaintiff, and you should also find that the deceased was guilty of contributory negligence—in other words that his own negligence contributed to his death—even in that case the plaintiff could recover if the defendant in the exercise of reasonable care ought to have discovered the danger in time to save him and did not do so. Now, I will repeat that. I say that even if the deceased was guilty of contributory negligence, still, if the defendant, in the exercise of reasonable care ought to have discovered his danger in time to save him and did not do so the plaintiff can recover. In defining reasonable care the element of danger is important. What is reasonable care in one case might not be in another. Gentlemen, it is that care and precaution which an ordinarily prudent and careful man would use to avoid injury to others in view of all the circumstances and in view of the probability of injury. If you find the deceased guilty of contributory negligence and that the defendant did not use reasonable care, still you have to determine whether or not the defendant should have discovered the danger of the deceased in time to save him. And there, if you find that not having a flagman or watchman at this crossing is negligence on the part of the defendant, and that, gentlemen, is purely a question for you to find, you are to find whether or not the fact that no flagman was at that crossing was negligence on the part of the defendant and was not using reasonable care, then you have still to determine whether or not if the flagman had been there he should have seen, in the exercise of his duty, the danger to this deceased in time to have prevented the accident. Now, do I make that clear—if you find that it was negligence for this defendant not to have a flagman at that crossing, still you must find that the flagman had he been there should have seen the danger to the deceased in the exercise of the flagman's duty in time to have prevented the accident and did not do so. Now, those facts you must determine before the plaintiff can recover. So

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it is with the engineer. If you find that the engineer did not look in time to see this man you have got to find whether or not he could have seen him by the exercise of reasonable care—that is, the ordinary reasonable manager that an engineer ought to do, not what he did do perhaps, but what he ought to do in running his train—and that if he had done what he ought to do he might then have prevented the accident after seeing the danger of the deceased.

If you find, gentlemen, that the plaintiff is not entitled to recover on the charge I have given you, and the facts as you have heard them from the witnesses, then, of course, your verdict would be for the defendant, and you have nothing further to consider. If, on the other hand, you find in view of the charge of the court, and the facts as found by yourselves, that there should be a recovery for the plaintiff, then you must determine the amount of damages. I charge you, on that point, that the deceased had he lived would have been entitled to recover, first for his physical pain and suffering and for his mental suffering, and such damages as were actually occasioned him by the accident, and that the right of action survives to this plaintiff for herself and her minor children for such pain and suffering, physical and mental, as the deceased suffered. Further than that she is entitled to recover for the loss of the support of the husband and father; that is, if you find that she is entitled to recover anything. Now, then, the amount, gentlemen, you must determine. You are not to take it for granted that the amount set forth in the plaintiff's petition is correct, although you cannot exceed that, but you are to look into the facts of the case, take into consideration all the probabilities, the amount that this deceased was earning, the probabilities of his continued health, etc. But the question of amount, gentlemen, you should not approach until you have first determined the liability.

I have been asked to give some special instructions and I will give plaintiff's instruction No. 4: "The violation of the city ordinance requiring the ringing of bells at intervals within city limits is evidence of negligence on the part of the employees of the railroad company for whom the railroad company is liable, if you should find from the evidence in this case that the bell was not rung upon the approach of a crossing." Gentlemen, I will add to that that you must determine also whether or not the negligence was the cause of the death before you can give a verdict for the plaintiff.

I will give the plaintiff's instruction No. 5, as follows: "It is for you to decide whether or not the engineer in charge of this engine was competent or physically fit to discharge properly the duties of his employment, and if you find that he was not, then I charge you that it was negligent on the part of the company to employ him for that work." So also, you must find, if

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you do find in accordance with this charge, you must also find that that negligence was the cause of the death before there could be a recovery on that score.

I will give the defendant's instruction No. 3: "The court instructs the jury, that the basis of this action is negligence, which is defined by law to be: The omitting to do something that a reasonable prudent person would do, or the doing of something that such person would not do. Under the circumstances of this case, and as applied to the case, if you find from the evidence that the defendant by its employees has omitted to do something that a reasonable prudent person would do, or has done something that such person would not do, you would be warranted in finding the defendant was guilty of negligence; and if you find that plaintiff's husband has done something or omitted to do something which directly contributed to the collision and injury, then you will be warranted in finding such person guilty of contributory negligence."

Now, gentlemen, I will repeat that in order to find a verdict for the plaintiff you must determine whether or not the defendant has been negligent. If there was nothing else to the case, and you find the death resulted from the negligence of the defendant, and by that I mean the persons in charge of the train, also, your verdict would be for the plaintiff, and the amount you fix. If you find, on the other hand, that the deceased was guilty of contributory negligence—in other words, that his own acts, his own negligent action contributed to his death, or caused his death notwithstanding the negligence of the defendant, and you also find that the defendant could not by the use of ordinary care have prevented the accident after he ought to have seen the danger to the deceased—then the verdict must be for the defendant. But if you find that although the deceased was guilty of contributory negligence, and that the defendant ought to have run its trains so that in the circumstances of this case by the exercise of ordinary and reasonable care it would have discovered the danger to the deceased in time to prevent the accident, why, then, notwithstanding the contributory negligence, your verdict should be for the plaintiff. Now, gentlemen, I do not know whether I have made myself clear but I have tried to.

I am requested to charge you, gentlemen, as to the form of the verdict, and you will elect your own foreman, and you reach a verdict; if you find for the defendant you will write—your foreman will write—on the back of the petition which you will take with you, "We, the jury, find a verdict in favor of the defendant," and sign it. If you find a verdict in favor of the plaintiff, you will write it this way: "We, the jury, find a verdict in favor of the plaintiff in the sum of so many dollars in her behalf, and in so many dollars for the use and benefit of the two minor children." I think, if you find for the plaintiff, you ought

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to divide your verdict into three parts, and say: "We, the jury, find a verdict in favor of the plaintiff in so many dollars, and in so many dollars for such a minor child, and in so many dollars for such a minor child." When you have reached a verdict you will seal it up in an envelope and give it to the bailiff who will have you in charge, and you return in court to-morrow morning at 11 o'clock for the opening and reading of the verdict.

Gustave Lemle, for plaintiff in error.

Armand Romain, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. The evidence required a submission of the issues of negligence and contributory negligence to the jury, and we find no reversible error in the charges given or refused.

The judgment of the Circuit Court is affirmed.

TEXAS MIDLAND R. CO. v. GERALDON.

(Supreme Court of Texas, May 25, 1910.)

[128 S. W. Rep. 611.]

Carriers—Passengers—Persons in Waiting Room.*—One entering a depot waiting room for the purpose of taking a train is not a trespasser, and he may remain there until his train arrives, subject to the right of the railroad to close its building at such hour as its reasonable rules may require.

Carriers—Passengers—Persons in Waiting Room.†—The agent of a railroad, who has the right to enforce a reasonable rule for the closing of a depot building, must use ordinary care not to place one occupying a waiting room therein while waiting for a train in a position which will probably endanger health or life, and where the condition of a woman in the waiting room waiting for a train was such that for her to leave the room while it was raining would endanger her health, the agent, knowing of her condition, could not lawfully force her out of the room, and, where he did so to her injury, the railroad was liable.

*For the authorities in this series on the question whether a person may be a passenger before he boards a train or street car, see first foot-note of *Philadelphia, etc., R. Co. v. Green* (Md.), 34 R. R. R. 414, 57 Am. & Eng. R. Cas., N. S., 414; first foot-note of *Karr v. Milwaukee, etc., Co.* (Wis.), 25 R. R. R. 623, 48 Am. & Eng. R. Cas., N. S., 623, where all those preceding it are collected.

†For the authorities in this series on the subject of the duty to keep stations and depots open for the accommodation of passengers, see foot-note of *Draper v. Evansville, etc., Co.* (Ind.), 18 R. R. R. 255, 41 Am. & Eng. R. Cas., N. S., 255; *Chicago & A. R. Co. v. Walker* (Ill.), 18 R. R. R. 596, 41 Am. & Eng. R. Cas., N. S., 596.

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Carriers—Passengers—Persons in Waiting Room.—Where an agent of a railroad forcing a woman to leave the waiting room at a depot while waiting there for a train was informed that she was in no condition to go out into the rain at night, he had notice of her condition resulting from her monthly sickness, and the railroad was liable for the injuries received by her in consequence of being forced to leave the room in the rain.

Error from Court of Civil Appeals of Sixth Supreme Judicial District.

Action by F. A. Geraldton against the Texas Midland Railroad Company. There was a judgment of the Court of Civil Appeals (117 S. W. 1004) affirming a judgment for plaintiff, and defendant brings error. Affirmed.

Ogden, Brooks & Napier and *A. H. Dashiell*, for plaintiff in error.

Mulkey & Hamilton and *Looney & Clark*, for defendant in error.

BROWN, J. The defendant in error with his wife and child, accompanied by another man and his wife, not necessary to be mentioned hereafter, went to Enloe, a small village in Delta county on plaintiff in error's road, for the purpose to take the train on that road to the town of Commerce. They arrived at Enloe between 5 and 6 o'clock in the afternoon, but the train on which they expected to take passage had already passed, and defendant in error placed his wife and child in the depot, and went out upon the platform of the depot building, and went to work boxing his goods in order to have them ready for shipment on the next train which would pass the station about 5 o'clock the next morning. After the goods were boxed, about 9 o'clock that night, defendant in error and the other members of the party concluded to remain in the depot until the train should arrive the next morning. The defendant's agent had seen them in and about the waiting room of the depot that afternoon and evening, but no objection was made to their remaining therein. About 10 o'clock that night a train passed on defendant's road, going in the opposite direction to that which the party wished to go, after which the agent came into the room and spoke to them, asking, "Where are you folks going?" to which defendant in error replied that they were going to Commerce, whereupon the agent said in a rough manner, "Well, you will have to get out, for I am going to close up this house." It was then raining, and defendant in error said to the agent that he did not want to go out into the rain, that his wife was "in no condition to go out into the rain," to which the agent replied, "Well, you will have to go out all the same." Geraldton replied, "Well, you will have to put me out;" whereupon the agent called

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to the marshal of the town who was standing near by, and told him to put them out of the depot. This alarmed Mrs. Geraldton, and she became excited, and defendant in error said, "Before I will be arrested, I will go out," and he with his wife and the other members of the party went to seek a lodging house, which they found at a distance variously estimated at from 150 to 300 yards from the station. It was raining at the time the party left the station, so that by the time Mrs. Geraldton reached the lodging house she was wet to the skin, and had no clothes for a change. Her monthly sickness was on at the time, and the wetting caused it to stop, which produced sickness and suffering on her part not necessary to be more particular described. On the next morning Geraldton, his wife, child, and party returned to the depot for the purpose of taking the train to Commerce, and, having bought tickets of the agent of defendant in error, the party took their seats in the depot room to await the arrival of the train, after which an officer entered the room and approached the window at which the agent was standing and where he had sold the tickets, asking of the agent, "Which is the man that has the gun?" The agent pointed over to Geraldton and said, "There he sits over there," and the officer came over to where Geraldton was, and asked him if he had a gun, to which Geraldton replied that he had not, and the officer said he would have to search him, and he did so, finding no gun on his person, but a hammer with which he had boxed his goods the evening before. Persons who were present in the room laughed at Geraldton at being searched, which caused him mortification.

This suit was instituted by defendant in error in the district court of Hunt county to recover damages for the injury to his wife, and also for the damages done himself and his wife by the mortification of being threatened with arrest and being searched for a gun the next morning. The case was tried before a jury, and the trial court was requested by the defendant to give to the jury a charge which practically directed them to return a verdict for the defendant. The court refused to give the charge which is assigned as error in this court.

The plaintiff in error having prepared a waiting room in its depot building at Enloe for persons desiring to take passage on the train, Geraldton and his wife, who entered that waiting room, were not trespassers; they came with the purpose of taking passage on one of the defendant's trains, and, being too late, they had the right to remain in the waiting room until the next train should arrive upon which they could go to the place of their destination, subject, however, to the right of the railroad company to close its building at such hour as its reasonable rules might require. The agent of the railroad company had the lawful right to close the waiting room and to require the occupants of it to retire at the hour shown by the testimony. But in executing the orders

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and the rules of the company, the agent was required to use ordinary care to not place any occupant of the said room in a position which would probably endanger health or life.

We must assume, in deference to the verdict of the jury, that the agent of the railroad company knew that the condition of Mrs. Geraldton was such that for her to go out into the rain at night would endanger her health, and we must assume that it was raining to that extent that made it reasonably certain to the agent that injury to her health might result from putting her out of the depot into such a rain as was then falling. Under such circumstances it was not lawful for the agent of the railroad company to force Mrs. Geraldton out of the room and into the rain whereby her health might be impaired, and it appearing from the evidence that the agent of plaintiff in error having thus knowingly forced Mrs. Geraldton out of the room and into the rain, which caused her to suffer physical pain, the railroad company was properly held responsible for the results. *Ploof v. Putnam*, 81 Vt. 471, 71 Atl. 188, 20 L. R. A. (N. S.) 152; s. c. 75 Atl. 277; *Railroad Co. v. Mother*, 5 Tex. Civ. App. 87, 24 S. W. 79; *Johnson v. C., R. I. & P. Ry. Co.*, 58 Iowa, 12 N. W. 349; *L. & N. Ry. Co. v. Ellis' Adm'r*, 97 Ky. 330, 30 S. W. 979; *L. C. & L. R. Co. v. Sullivan*, 81 Ky. 624, 50 Am. Rep. 186; *Weymire v. Wolfe*, 52 Iowa, 533, 3 N. W. 541.

The trial court did not err in submitting the issues involved in the above stated proposition to the jury upon the evidence before that court. It is claimed by the plaintiff in error that there was no evidence sufficient to notify the agent of the condition of Mrs. Geraldton. It was not necessary that he should know what was the particular disease with which she was then afflicted; it was sufficient to notify a man of ordinary intelligence and ordinary prudence that the information given him with regard to her condition was such as to make it unsafe for her to be subjected to such weather as then prevailed. The information given was sufficient to convey such notice to the agent. It is known to all men of any experience and intelligence that women are almost universally subject, to menstrual periods, and it is a matter of common knowledge that references to this delicate subject are usually vague insinuations.

The relative rights and duties of the railroad company and Geraldton and his wife on this occasion are analogous to those existing between persons improperly upon moving trains, when it becomes the duty of the conductor to remove them from the train. His right to remove them under such conditions is not questioned, but it is beyond all controversy his duty to see that he does not, in so doing, expose the persons to danger of health or of life, either on account of the character of the place at which he may expel them from the train, or in the conditions that surround them as to the weather, or other facts which would make

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it dangerous for such persons to be so left. We deem it unnecessary to comment upon the different cases cited as authority herein. We call attention, however, to the case of *Weymire v. Wolfe*, cited above. In that case Wolfe was the keeper of a saloon at which one Dunn was in the habit of drinking and becoming intoxicated. On the occasion in question the weather was inclement, and Dunn, having become intoxicated, remained in the building until a late hour at night. He was intoxicated to such degree as to be incapable of taking care of himself or of being conscious of danger. At a late hour in the night Wolfe expelled Dunn from his saloon building, exposing him to inclement weather in his unconscious and helpless condition, from the effects of which he died. The court held that Wolfe was liable for wrongfully expelling the man, known to be incapable of taking care of himself, and thus exposing him to the cold. The foundation of liability in such case is not a want of authority over one's premises, nor a want of authority to expel an intruder therefrom, but it rests upon the fact that the person expelled is known to be in a condition which renders him incapable of taking measures for his own safety. Common humanity forbids that one should, under such conditions, exercise a legal right so as to produce serious injury to a fellow man. Geraldton and his wife only wished the agent to permit them to remain until the rain should cease, which, in all probability, would have been but a short time. They had been invited by the railroad company to enter the room, and were there to secure passage upon the company's train for which they must wait; that room was provided for such conditions. The evidence justifies a conclusion that the agent acted arbitrarily in ejecting Mrs. Geraldton. There are many cases in which the right of the railroad company to expel trespassers from its trains have been passed upon, and uniformly it has been held that such right must be exercised with due regard to safety of life and health of the person to be removed, whether he be an actual trespasser, or whether he be one who has been misled into his attitude towards the company. If the facts testified to by the witnesses be true, they presented such conditions as called for the exercise of ordinary care on the part of the agent towards Geraldton and his wife, and, if the evidence of the witnesses be true, it is unquestionably a fact that the agent did not conduct himself as a man of ordinary prudence would under similar circumstances.

In the course of human events conditions arise which require that one shall forbear to exact an observance of his legal rights, and which will justify the other party in disregarding such right to prevent injury to health or the loss of life. This proposition is well illustrated by the facts and decision of the court in *Proof v. Putnam*, 81 Vt. 471, 71 Atl. 188, 20 L. R. A. (N. S.) 152, by the Supreme Court of Vermont. Putnam owned an island in

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Lake Champlain with a dock for mooring his boats. He instructed his servant in charge to prevent any other person to moor a boat at the dock. Ploof was on the lake in a boat with his wife and child. A storm arose, and in the fear of loss of his boat and the lives of his wife and child, Ploof ran his boat to the dock and fastened it to Putnam's mooring. The servant loosened Ploof's boat whereby it was put at the mercy of the storm and was driven ashore, from which the damage ensued. The Supreme Court of Vermont assumed that Putnam had a right to the exclusive use of his dock, and said: "There are many cases in the books which hold that necessity, and an inability to control movements inaugurated in the proper exercise of a strict right, will justify entries upon land and interferences with personal property that would otherwise have been trespasses. * * *

This doctrine of necessity applies with special force to the preservation of human life. One assaulted and in peril of his life may run through the close of another to escape from his assailant. 37 Hen. VII, Pl. 26. One may sacrifice the personal property of another to save his life or the lives of his fellows."

The agent of the railroad company had no right to eject plaintiff's wife from the waiting room of the station under the circumstances.

We have examined all assignments of error, and find no reason for disturbing the judgment of the district court. It is ordered that the judgments of the district court and Court of Civil Appeals be affirmed.

SCHLEY *v.* SUSQUEHANNA & N. Y. R. Co.

(Supreme Court of Pennsylvania, March 21, 1910.)

[76 Atl. Rep. 207.]

Carriers—Relation of Passenger—Termination.*—Where a passenger remained in a railway car 25 minutes after it had reached its station, which was the terminus of a road, he is no longer a passenger.

Trial—Directing Verdict—Consideration of Evidence.—In directing a verdict for defendant, the court may consider defendant's testimony when it is credible and not at variance with that of plaintiff.

Appeal from Court of Common Pleas, Lycoming County.

Action by George Schley against the Susquehanna & New York Railroad Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Argued before FELL, C. J., and MESTREZAT, ELKIN, STEWART, and MOSCHZISKER, JJ.

M. C. Rhone and *A. R. Jackson*, for appellant.

Seth T. McCormick and *C. H. McCauley*, for appellee.

PER CURIAM. The plaintiff was injured while in a combination passenger and baggage car that had been detached from a train and was standing on a siding in a yard at a station at the end of the defendant's road. The car had reached the station 25 minutes before the accident. It had stood there on the main track 10 minutes and had then been placed on the siding, where it was struck by a freight car and derailed.

*For the authorities in this series on the question whether a person may be a passenger after his train or street car arrives at destination, see first foot-note of *Powers v. Connecticut Co.* (Conn.), 34 R. R. R. 434, 57 Am. & Eng. R. Cas., N. S., 434 (after alighting from train or street car); *Southern Ry. Co. v. Skinner* (Ga.), 34 R. R. R. 186, 57 Am. & Eng. R. Cas., N. S., 186 (passenger carried to station to which he had ticket, remaining on train for purpose of going beyond station to place on road at which such train stopped to allow passengers to disembark, but to which place he had no ticket); *Chicago, etc., R. Co. v. Frazer* (Kan.), 2 Am. & Eng. R. Cas., N. S., 206 (failure to leave train within reasonable time); *Baldwin v. Grand Trunk R. Co.* (Mich.), 23 Am. & Eng. R. Cas., N. S., 117 (person on train not stopping at his station); *Forbes v. Chicago, etc., Ry. Co.* (Iowa), 26 R. R. R. 714, 49 Am. & Eng. R. Cas., N. S., 714 (failing to alight from train at point to which ticket was purchased); *Bass v. Cleveland, etc., Ry. Co.* (Mich.), 18 R. R. R. 600, 41 Am. & Eng. R. Cas., N. S., 600 (passenger failing to leave train because of carrier's failure to awaken him); *Anderson v. Missouri Pac. R. Co.* (Mo.), 20 R. R. R. 696, 43 Am. & Eng. R. Cas., N. S., 696 (passenger who has purchased ticket to certain point, but who, on reaching such point, decides to go farther, need not, in order to preserve his status as a passenger, alight from the train and then reenter, nor expressly notify the conductor of his purpose to continue his journey).

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The plaintiff had got on the car 12 miles from the station at which he was injured. He testified that he had been drinking and had a bottle of whiskey with him and drank while on the train; that he went to sleep when three miles from the station, and from that time he knew nothing until after the accident. The only evidence in support of the allegation of negligence was that the brake of the freight car did not hold. The brakeman called by the plaintiff was unable to explain why it did not hold, and it was not shown that it was defective before the accident. The conductor, called by the defendant, testified that, when the train reached the station and other passengers had gotten off, he went to the plaintiff and awoke him, told him they were at the end of the line and to get off; that he supposed the plaintiff had got off before he directed the removal of the car to the siding, but afterwards saw him in the car when it was in motion and told the flagman to get him off when the car stopped. A brakeman testified that he saw the plaintiff walk from the passenger to the baggage department of the car while it stood on the siding.

According to the plaintiff's testimony, the burden of proof of negligence was on him because he was not a passenger when injured. He had remained in the car 25 minutes after it had reached the station. According to the undisputed testimony of the defendant's witnesses, the plaintiff was aroused from his sleep at the station and was awake in the car 10 or 15 minutes after it had been placed on the siding. The court was justified in considering this testimony in directing a verdict. "When the testimony is not in itself improbable, is not at variance with any proved or admitted facts, or with ordinary experience, and comes from witnesses whose candor there is no apparent ground for doubting, the jury is not at liberty to indulge in a capricious disbelief. If they do so, it is the duty of the court to set aside the verdict; and, where that is the case, the court may refuse to submit it at all and direct a verdict accordingly." *Lonzer v. Railroad Co.*, 196 Pa. 610, 46 Atl. 937.

The judgment is affirmed.

WASHINGTON, A. & MT. V. RY. CO. *v.* TRIMYER.

(Supreme Court of Appeals of Virginia, March 10, 1910.)

[67 S. E. Rep. 531.]

Carriers—Injury to Passenger—Failure to Stop Train—Prior Similar Acts.*—In an action for injuries alleged to have resulted from defendant's failure to stop its train at the intersection of another railroad, as was its duty to do, evidence is admissible that on prior occasions defendant had failed to stop its trains at this place.

Carriers—Duty and Liability to Passengers.†—A carrier is liable for the slightest negligence resulting in injury to a passenger, and the utmost care and diligence of cautious persons to prevent such injury is imposed by law.

Carriers—Liability to Passengers—Effect of Contract Between Carriers.—A contract between carriers as to the stopping of trains at an intersection of their roads cannot control or affect the degree of care which a carrier owes to its passengers to avoid collisions.

Carriers—Injury to Passengers—Cause of Injury—Evidence.—In an action against a street car company for injuries to a passenger by a collision between a car and a locomotive on a steam railroad at a crossing, a contract between the companies as to the stopping of trains on approaching the crossing is admissible on the question of whose negligence was the proximate cause of the accident, and whose the remote cause.

Trial—Objection to Evidence.—Where evidence was admissible for any purpose, a general objection to its introduction is properly overruled.

Appeal and Error—Review—Harmless Error—Rulings as to Evidence.—Where the court directed the jury that only a specified portion of a contract read in evidence should be considered, and no prejudice appears, the error of reading the entire contract is immaterial.

Carriers—Collision at Railroad Crossing—Negligence—Question for Jury.—Whether a street car company used proper care to avoid a collision at a railroad crossing is a question for the jury, and it is error to instruct that negligence is presumed from a failure to stop the car at least 20 feet from the crossing; there being no guards, or other safety devices, at the crossing.

Appeal and Error—Harmless Error—Error Favorable to Appellant—Instructions.—A judgment against a street car company will

*See extensive note, 19 R. R. R. 278, 42 Am. & Eng. R. Cas., N. S., 278.

†See second foot-note of *Christensen v. Oregon Short Line R. Co.* (Utah), 34 R. R. R. 253, 57 Am. & Eng. R. Cas., N. S., 253; last foot-note of *Irwin v. Louisville & N. R. Co.* (Ala.), 34 R. R. R. 11, 57 Am. & Eng. R. Cas., N. S., 11; *Colorado & S. Ry. Co. v. McGeorge* (Colo.), 33 R. R. R. 700, 56 Am. & Eng. R. Cas., N. S., 700.

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not be reversed for an instruction imposing on defendant a lower degree of care in behalf of its passengers than the law requires.

Carriers—Collision at Railroad Crossing—Actions for Damages—Instructions.—In an action against a street car company for injuries to a passenger in a collision at the crossing of a steam railroad, defendant requested an instruction that “even if defendant’s employees were negligent, if notwithstanding such negligence the accident would not have occurred but for the negligence of the employees of the steam railroad company, and if such employees could, with the exercise of due care, have discovered the presence of defendant’s car on the crossing in time to have avoided the accident, and that the injuries complained of resulted from such neglect, such neglect must be considered the proximate cause of the accident, and that of defendant the remote cause.” Held, that the instruction was properly refused, as it does not present a case of the intervention of the act of a responsible agent, to whose misconduct the injury could be referred as a proximate cause, so as to render the original negligence of defendant company a remote cause or mere condition of the accident.

Error to Circuit Court of City of Alexandria.

Action by John H. Trimyer against the Washington, Alexandria & Mt. Vernon Railway Company. Plaintiff had judgment, and defendant brings error. Reversed.

Moore, Barbour & Keith and *Jas. R. & H. B. Caton*, for plaintiff in error.

C. E. Nicol, for defendant in error.

KEITH, P. John H. Trimyer recovered a judgment against the Washington, Alexandria & Mt. Vernon Railway Company in the circuit court of the city of Alexandria, to which a writ of error was awarded.

The injury for which this suit was brought occurred at a point where the tracks of the Washington, Alexandria & Mt. Vernon Railway Company crossed that of the Washington-Southern Steam Railway, at the intersection of Henry and Cameron streets, in the city of Alexandria; and the object of the testimony offered by the plaintiff and admitted over the objection of the defendant, as set out in bills of exceptions Nos. 1 and 2, was to prove that the accident resulted from the failure of the Washington, Alexandria & Mt. Vernon Railway Company to stop its train at this intersection, as it is alleged it was its duty to do; and as tending to prove that, on the occasion when the accident occurred it did not halt its train, it was sought to introduce evidence that on other occasions prior thereto it had not done so.

In the case of *Brighthope Railway Co. v. Rogers*, 76 Va. 448, testimony was admitted tending to show that the defendant’s locomotive on occasions other than that for which the action was

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brought had emitted sparks and communicated fire to the property along its track and right of way. The court considered that this evidence was relevant and proper for the purpose of showing negligence on the part of the defendant's employees or defects in the construction of its engine.

In the case of *Grand Trunk Ry. Co. v. Richardson*, 91 U. S. 454, 23 L. Ed. 356, the Supreme Court was of opinion that evidence was properly received to show that fire had been communicated by sparks at other times and from other locomotives, in order to show a negligent habit on the part of the railway company's officers and agents. Said Mr. Justice Strong: "It is, of course, indirect evidence, if it be evidence at all. In this case it was proved that engines run by the defendant had crossed the bridge not long before it took fire. The particular engines were not identified; but their crossing raised at least some probability, in the absence of proof of any other known cause, that they caused the fire, and it seems to us that under the circumstances, this probability was strengthened by the fact that some engines of the same defendant at other times during the same season had scattered fire during their passage."

In *A. & F. Ry. Co. v. Herndon*, 87 Va. 193, 12 S. E. 289, this court affirmed a judgment in which evidence had been admitted tending to show that prior to the accident there being investigated it was customary for the defendant to stop its trains on arriving at a particular point.

The assignment of error based upon the first and second bills of exceptions is overruled, and, so far as it rests upon the third and fourth bills of exceptions, it was withdrawn by counsel for plaintiff in error in open court.

The second assignment of error is to the action of the court in admitting in evidence the contract between the Washington, Alexandria & Mt. Vernon Railway Company and the Washington-Southern Railway Company.

While the court permitted the entire contract to be read to the jury, they were instructed to disregard all of it except the following paragraph:

"The said party of the first part hereby further agrees, for the consideration aforesaid, that whenever any of its cars propelled by electricity shall approach such crossing it shall be stopped at a distance of at least twenty feet from the railway track of the said parties of the second part of Henry street; and that the conductor of such car shall go forward to such crossing and ascertain whether or not any train, engine, car, or other vehicle is approaching upon the railway of the parties of the second part; and that such car shall not cross over the railway of the parties of the second part until after the conductor shall have ascertained that no train, engine, car or other vehicle is approaching upon the railway of the parties of the second part,

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and shall have given the man in charge of the motor a signal to cross."

We do not think the contract was admissible as establishing the degree of care which the railway company owed to its passengers. That is fixed by law, which holds the defendant railway company responsible for the slightest negligence resulting in an injury to a passenger, and imposes upon it the utmost care and diligence of cautious persons to prevent such injury. *Farish v. Reigle*, 11 Grat. 697, 62 Am. Dec. 666. We think it evident that such a contract cannot control the responsibility imposed by law, if relied upon by the carrier in diminution of its liability. Clearly the answer would be that its responsibility was to be measured by the law of the land, and not by contracts to which the injured party was a stranger. Indeed, if such a contract tended to relieve the defendant of the consequences of its negligence, it would be repugnant to section 1294c, cl. 25, Code. See *N. & W. Ry. Co. v. Tanner*, 100 Va. 379, 41 S. E. 721.

There is another aspect, however, in which that portion of the contract which the court allowed the jury to consider would be admissible. The railway company rested its defense, in part, upon the suggestion that the negligence of the steam railway company was the proximate cause, and its negligence, if any, was the remote cause, of the accident. It was therefore proper to introduce the contract between the plaintiff in error and the companies operating the steam railways to show their relative duties to each other. If the defendant had requested the court to limit the effect of the contract, as we have indicated, it should have been done; but, as the objection to its introduction was general, and as it was admissible for the purpose indicated, the exception taken to the action of the court must be overruled. *Hardy v. Commonwealth* (decided at the present term) 67 S. E. 522.

The third assignment of error is to the refusal of the court to discharge the jury from the further consideration of the case, because the entire contract just considered had been read in the presence of the jury.

It is not clear why the court permitted the entire contract to be read to the jury when it was of opinion that only a particular clause should be considered by them, but it cautioned the jury that only a particular part should be considered, and it is to be presumed that the jury obeyed a direction which it was plainly within the province of the court to give; and, nothing appearing to show that the reading of the entire contract operated injuriously to the rights of plaintiff in error, this assignment is overruled.

The fourth assignment of error is to the granting of the third and fifth instructions prayed for by the plaintiff.

The third instruction is as follows: "The court instructs the

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jury that if they believe from the evidence that on the night of the collision between an electric train of the Washington, Alexandria & Mt. Vernon Railway and a light engine of the Southern Railway at the intersection of Cameron and Henry streets in Alexandria City, Va., the defendant, the said Washington, Alexandria & Mt. Vernon Railway Company failed to bring its said colliding train to a full stop at least 20 feet before getting to the said crossing of the said Southern Railroad and the said Washington, Alexandria & Mt. Vernon Railway at the intersection of said Henry and Cameron streets, then, in that event the said defendant, the Washington, Alexandria & Mt. Vernon Railway Company is presumed to be guilty of negligence, provided the jury further believe from the evidence that at such crossing there are no derailing switches or other safety appliances which prevent collision at said crossing, nor at the hour of said collision no flagman or watchman was stationed at said crossing, and that no signal tower was located at said crossing and signaled that said train might cross in safety."

In *Norfolk & Portsmouth Traction Co. v. Ellington*, 108 Va. 245, 61 S. E. 779, it was held that section 162 of the Constitution of the state and section 1294k of the Code, which abolish the doctrine of fellow servant as to employees of railroad companies, do not apply to employees of electric street railway companies; but that the words "railroad company" as employed in those sections were only intended to apply to railroads proper or commercial railroads, and that the language of the Constitution and of the statute passed in pursuance thereof, and the history and reason of these provisions, indicate that street railways were not intended to be embraced.

That decision and the argument by which it is supported apply with equal force to clause 51, § 1294d, of Code.

The crossing of the steam railway, however, by the trains of the plaintiff in error, was, without doubt, attended with danger, and it was the duty of plaintiff in error under the general law to use the utmost care and diligence of a cautious person for the protection of its passengers, and it may well be that the duty thus imposed would have been as great as that which is set forth in the instruction; but it would have been for the jury to say whether or not under all the circumstances of the case the railroad company had fulfilled the measure of its duty, while in this instruction the jury was told, as a matter of law, that the failure to do the particular thing indicated was proof of negligence. We are of opinion that it was error to give this instruction.

The fifth instruction tells the jury that it was the duty of those in charge of the electric train of the Washington, Alexandria & Mt. Vernon Railway Company to exercise the same care or degree of care to avoid a collision as is required to be exercised by persons driving or operating any ordinary vehicle

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across steam railroad tracks, and that it was the duty of the persons operating the electric train to look and listen for any approaching engine or train on said steam road, and that, if the jury believe from the evidence that they failed to do so, the said Washington, Alexandria & Mt. Vernon Railway Company was guilty of negligence, and, if the jury believe from the evidence that the plaintiff was injured by said negligence, they shall find for the plaintiff.

A person driving in an ordinary vehicle upon approaching a railroad crossing must exercise ordinary care for his own protection, while the plaintiff in error, being itself a carrier of passengers, was under a higher obligation, for it was responsible for the slightest negligence on its part, and was bound to use the utmost care and diligence of a cautious person to protect its passengers from injury. As this instruction imposed upon the plaintiff in error a lighter burden than the law warranted, we do not perceive that it was aggrieved in this respect.

The fifth assignment of error is to the refusal of the court to give the eleventh instruction, which is as follows: "Even though the jury may believe from the evidence that the employees of the defendant company were guilty of negligence in approaching the crossing of the steam railway and in proceeding to cross it without exercising due care, yet, if they further believe from the evidence that notwithstanding the said act of negligence of the defendant company the accident would not have occurred but for the independent negligence of the Southern Railway or its employees, and that if the Southern Railway Company's employees had acted with due diligence, and had approached said crossing in a duly careful manner, that the presence of the cars of the defendant company on said crossing could and would have been discovered in time to avert the accident, and that the injuries complained of resulted from such neglect, the neglect of the Southern Railway Company must be considered as the proximate cause of the accident, and that of the defendant the remote cause, and the verdict should be for the defendant."

We see no error in refusing this instruction. Upon the face of the instruction, we do not think it presents a case of the intervention of the act of a responsible agent, to whose misconduct the injury is to be referred as a proximate cause, so as to render the original and conceded negligence of the defendant company the remote cause or mere condition of the accident.

For the error in granting the third instruction, however, the judgment must be reversed, and the cause remanded for a new trial.

Reversed.

BUCHANAN and WHITTLE, JJ., absent.

CLANTON *v.* SOUTHERN RY. CO. *et al.*

(Supreme Court of Alabama, Feb. 3, 1910.)

[51 So. Rep. 616.]

Carriers—Passengers—Contributory Negligence.*—Except under special circumstances, it is negligence for a passenger to stand on the platform of a car of a rapidly moving train.

Carriers—Passengers—Negligence—Duty as to Drop Doors.†—In the absence of special circumstances, the drop doors over the steps of a vestibuled train need not be kept down when the train is standing at a station to take on or discharge passengers, during which time trainmen must pass on and off the train; and the mere fact that passengers at stations were in the habit of resorting to the rear platform without acquiescence of the carrier, shown by keeping the drop door down at stations, though known by the carrier, did not impose on it the duty of foregoing the ordinary use of the appliance.

Carriers—Passengers—Negligence—Duty as to Drop Doors on Platform—Question for Jury.—Where a passenger left the vestibuled coach she had boarded and went on the rear platform while the train was standing at the station at night, for the sole purpose of standing there, because the coach was hot and uncomfortable, and was injured by falling down the steps, because the drop door was raised, and because of the absence of a light, the court could not declare as a matter of law that the carrier was negligent in failing to have the drop door down, or in failing to maintain a light in the vestibule.

Carriers—Injuries to Passengers—Contributory Negligence—Going Onto Platform.—Where a passenger, with knowledge of the purpose of drop doors on the platform of a vestibuled train and of the reasonable use of the same while the train was standing at a station, left the coach, she had boarded and went upon the platform for the sole purpose of standing there while the train was at the station, and she was injured by falling down the steps, because the drop door was raised, and because of the absence of a light, she was guilty of contributory negligence, precluding a recovery.

Carriers—Injuries to Passengers—Assumption of Risk.—She assumed the risk of injury, though the carrier knew that passengers were in the habit of resorting to the platform, where the carrier did not acquiesce therein by keeping the drop door down at stations.

Appeal from Law and Equity Court, Madison County; Tancred Betts, Judge.

Action by Juliet Clanton against the Southern Railway Company and another. From a judgment for defendants, on sus-

*See last foot-note of *Davis v. Atlanta, etc., Ry. Co. (S. Car.)*, 34 R. R. R. 249, 57 Am. & Eng. R. Cas., N. S., 249.

†See note, 3 R. R. R. 163, 26 Am. & Eng. R. Cas., N. S., 163; second head-note of *St. Louis, etc., Ry. Co. v. Oliver (Ark.)*, 34 R. R. R. 191, 57 Am. & Eng. R. Cas., N. S., 191.

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taining a demurrer to each count of the complaint, plaintiff appeals. Affirmed.

The complaint was as follows:

"(1) Plaintiff claims of the defendants the sum of \$25,000 damages, for this: That on, to wit, the 30th day of September, 1907, the defendant the Southern Railway Company, a corporation under the laws of the state of Virginia, was operating a train of cars, as a common carrier of passengers for hire, from Salisbury in the state of North Carolina, to Huntsville, in the state of Alabama, and the defendant the Pullman Company, a corporation, was at that time and place likewise engaged in operating a car, which was a part of the train of the defendant Southern Railway Company, between said Salisbury, N. C., and Huntsville, Ala. Having purchased a berth upon said car of said Pullman Company, that on said day plaintiff was a passenger on said Southern Railway Company, and in the car of the said Pullman Company, having boarded said train and said car at Salisbury, about 9 p. m. And plaintiff avers that when she entered said car all the berths had been made down, and said car was hot and disagreeable; and plaintiff avers that she stepped upon the rear platform of said car, and in so stepping upon said rear vestibule of said car, which was a vestibuled car end, while said car was standing in the station at Salisbury, she slipped and fell down the steps of said car to the ground, several feet below, and was greatly bruised and injured, in this: [Here follows description of injuries and claims for special damages.] And plaintiff avers that said injury was caused by reason of the negligence of the defendants, their servants, agents, or employees, in failing to keep said rear vestibule properly lighted, so as to render the same safe for the use of plaintiff and other passengers on said train or car, to plaintiff's damage."

(2) Claims same damages as 1, alleges the relation of passenger and carrier, and further alleges that while upon said train in said cars, and while said train and car were not in motion, but were standing at the station in Salisbury, the plaintiff went upon the rear platform of said car, which car was a vestibuled car, having at its rear end platforms to cover the steps leading into said car, and railings or doors to inclose the same, so as to render it a safe place for passengers to go on said car, and at the time plaintiff went upon said platform it was dark, and plaintiff fell down the steps, greatly injuring, etc. It is averred that her injury was caused by the negligence of the defendants, their servants, agents, or employees, in charge of said train, or said car, in this: That there was a door over said step, which, when down, formed a continuation of said platform, and plaintiff avers that said door over said step was raised, which fact was unknown to plaintiff, leaving said steps open and exposed, thereby causing plaintiff to fall.

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(3) Same as 2, with the additional allegation that the door was negligently opened or raised, or permitted to be raised and opened, without providing suitable lights to enable plaintiff and other passengers to know and be informed that said door was raised or opened, without the knowledge of the plaintiff that said door was raised or opened.

(4) Is a short statement of the facts alleged in count 3.

(5) Alleges the same facts as in the other counts, with the additional allegation that the car was a vestibuled car, with a platform at its rear which was commonly known as an "observation platform," and that it had doors covering the steps leading into said car, which, when down, formed a continuation of such platform, with a railing inclosing the same, so as to make it safe for passengers upon said car to go thereon; and plaintiff avers that passengers were accustomed to go upon said platform at their will, both while said trains were standing at the station and while in motion, which custom was known to the defendants. Then follow the allegations of the negligence as alleged in the other counts.

Brickell & Smith, for appellant.

Almon & Andrews, for appellee Southern Railway Company.

Cooper & Cooper and *Campbell & Johnston*, for appellee Pullman Car Company.

SAYRE, J. It is negligence, except under special circumstances, to stand upon the platform of a car of a rapidly moving commercial railroad train. The inevitable lurching and jerking of a train so propelled makes the danger obvious to the ordinary understanding and the negligence self-evident. Modern vestibuled trains are so constructed as to make convenient and invite passage from car to car. To minimize the danger, a lid or drop door is provided, which is let down over the steps when the train is in motion, thus in effect extending the platform to the side of the car. The nature of the contrivance is such that it obstructs all passage between the car and the ground when left down. The necessary result is that while the train is standing at a station to take on or discharge passengers, during which time employees engaged in operating the train and providing for its safety pass on and off, no rule of prudence, in the absence of special circumstances, requires that the lid, or drop door, or extension platform, be kept down.

The complaint shows that the plaintiff went upon her car—a sleeping car—as a passenger after night, and, having safely gotten aboard and into her appointed place, while yet the train was standing at the station, went out upon the rear platform, and was injured by falling down the steps. No occasion for her presence upon the platform is shown, except that in some of the

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counts it is alleged that the car was hot and uncomfortable. She went upon the platform, as we must infer, not to pass between cars, nor between her car and the ground; but she went there to be there. She charges her injury to the negligence of the defendants, in that the lid or drop door over the steps was raised, and there was no light in the vestibule, whereby she was enabled to know that fact. Plaintiff states the particular facts upon which she bases her charge of negligence. Upon them it must rest.

No defect in the construction or condition of the platform and steps is alleged, except that the drop door was raised, and no light provided in the vestibule. Plaintiff was not using the steps. Her case is that, standing upon the platform, she fell down the steps, because they were not covered. She asks the court to say that as matter of law the drop door ought to have been left down, or a light should have been so placed as to advise her of the fact that it was up. The nature of the device, as we have seen, excludes the first alternative conclusion. Nor can we say as matter of law, under the conditions described, that a light should have been maintained in the vestibule, nor are the pleadings so framed as to make that a question for the jury; or, if that were an uncertain question, we think we must say that, in any event, the plaintiff, being informed, as she must be held to have been, of the obvious purpose alike of steps and drop door, and their reasonable use while the train was stationary, and being also necessarily informed of the danger of her environment caused by the absence of a light, the latter itself a patently obvious fact, she cannot recover on the case she states, because she was either guilty of contributory negligence, or assumed the risk, when she went upon the platform under the circumstances then and there obtaining. It will be noted that we say nothing of the duty of railroad companies to maintain lights at stations.

If, however, the defendants induced plaintiff to believe that the drop door would remain down while the train stopped at the station, a different case would be presented, and plaintiff attempts to state such a case in one or more counts. The averment is that the platform was commonly used as an observation platform, and that the passengers on said car were accustomed to go upon said platform at their will, both while said train was standing at station and while in motion, which custom was known to the defendants. We observe here no averment that the platform was constructed for the purpose of serving as an observation platform. The averment is nothing more, indeed, than that the passengers on that car were in the habit of resorting to the platform, a habit known to the defendants. Such habit, without more, without acquiescence of the defendants, shown by keeping the drop door down at stations, though known,

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could not impose upon them the duty to forego the ordinary use of the appliances of the train, nor relieve the plaintiff of the assumption of the risk suggested by a known environment.

We find nothing to the contrary to what we have said in the cases which have been brought to our notice. They are all cases in which passengers received injury by reason of the fact that the drop doors of vestibuled cars were left up while the train was in progress between stations. *Crandall v. M., St. P. & S. S. M. Rwy. Co.*, 96 Minn. 434, 105 N. W. 185, 2 L. R. A. (N. S.) 645, 113 Am. St. Rep. 653, and the cases discussed in the appended case note are relied upon. In that case plaintiff's aunt, in whose charge he was, had the express assurance of an employee of the railroad company that the platform was a safe place for the child with her, a boy only seven years old, as everything was securely fastened. Thereupon she permitted the boy to go upon the platform, from which he fell through the open door and was injured. The ruling was that the defendant was not bound to have the car vestibuled; but, having done so, it could not lead passengers to believe that the doors of the vestibule would be kept closed between stations, and then negligently leave them open, without incurring liability to a passenger injured thereby. That hardly seems a debatable case; certainly it does not sustain plaintiff's position in the case at bar. *Bronson v. Oakes*, 76 Fed. 734, 22 C. C. A. 520, and *N. P. R. R. Co. v. Adams*, 116 Fed. 324, 54 C. C. A. 196, proceed upon an identical principle. We are in full accord with these cases, but are unable to see that they give comfort to the appellant.

The judgment of the court below, sustaining demurrer to each count of the complaint, must be affirmed.

Affirmed.

DOWDELL, C. J., and ANDERSON and MAYFIELD, JJ., concur.

WHITLOCK v. NORTHERN PAC. RY. CO. *et al.*

(Supreme Court of Washington, June 11, 1910.)

[109 Pac. Rep. 188.]

Carriers—Injury to Passengers—Ejection from Station.*—Where defendant's station agent called a deputy sheriff to eject certain undesirable persons, not passengers, from the station, and, while the agent was requesting those who did not have tickets to leave, the officer began to push plaintiff from the room, and struck him a blow on the neck with his hand or fist, when the agent, seeing the assault, notified the sheriff that plaintiff was a passenger holding a ticket, whereupon no further efforts to eject plaintiff were made, the railroad company was not relieved from liability because the assault was committed by the officer; he having acted at the request of the company's agent.

Appeal and Error—Instructions—Prejudice.—In an action for injuries to a passenger by an assault in an endeavor to eject him from a carrier's station, an instruction that the law holds the carrier to the highest degree of care as against its own "machinery and appliances," its cars and the operation of its road, and the conduct of its employees compatible with the ordinary conduct of its business, while erroneous as abstract in so far as it related to machinery and appliances, was not prejudicial to defendant as injecting other issues into the case.

Carriers—Passengers—Ejection—Highest Degree of Care.—Where a passenger having gone to a carrier's station and purchased a ticket was lawfully in the waiting room waiting for his train, when he was assaulted in an attempt to eject him by an officer, acting at the request of the station agent, under a mistaken belief that he was a trespasser, the passenger was entitled to an instruction requiring the carrier to exercise the highest degree of care to protect him from assault.

Carriers—Personal Injuries—Damages—Assault—Excessiveness.—Plaintiff while waiting for defendant's train in a station, after having purchased a ticket, was assaulted by an officer in a mistaken attempt to eject him as a trespasser with others pursuant to the request of the station agent. No serious personal injury was inflicted on plaintiff, though he suffered pain for about 36 hours and some inconvenience for about 30 days. He suffered no pecuniary loss or loss of time, and, after the agent discovered that the officer had struck plaintiff, he called attention to the fact that a mistake had

*See foot-note of *Arnold v. Atchison, etc., Ry. Co.* (Kan.), 34 R. R. R. 438, 57 Am. & Eng. R. Cas., N. S., 438; *Philadelphia, etc., R. Co. v. Green* (Md.), 34 R. R. R. 414, 57 Am. & Eng. R. Cas., N. S., 414; *Birmingham, etc., P. Co. v. Parker* (Ala.), 34 R. R. R. 215, 57 Am. & Eng. R. Cas., N. S., 215; *Yazoo & M. V. R. Co. v. Shelby* (Miss.), 34 R. R. R. 54, 57 Am. & Eng. R. Cas., N. S., 54.

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been made, and there was no further effort to eject him from the station or to assault him. Held, that a verdict for \$1,000 was excessive, and should be reduced to \$500.

Department 2. Appeal from Superior Court, King County; Wilson R. Gay, Judge.

Action by C. R. Whitlock against the Northern Pacific Railway Company and another. Judgment for plaintiff, and defendants appeal. Reversed on condition.

I. B. Knickerbocker, Carroll B. Graves, and Charles H. Winders, for appellants.

Holzheimer, Herald & Holzeimer, for respondent.

MOUNT, J. The respondent recovered a judgment against the appellants for \$1,000 on account of an assault committed upon him by the appellant Roehl. The plaintiff alleged that the defendant Roehl was an agent and servant for the railway company, employed as a watchman at its station at Auburn; that on March 21, 1909, plaintiff purchased a ticket at that station, entitling him to transportation from Auburn to Covington Station; that after purchasing such ticket, and while peacefully awaiting the arrival of the train, the defendant Roehl wrongfully endeavored to eject him from the station, and violently assaulted plaintiff and inflicted severe injuries upon him. At the close of plaintiff's evidence, the defendants moved the court for a nonsuit, which motion was denied.

It is argued here that the facts were not sufficient to support a verdict for the plaintiff. It appears that Auburn Station is a junction point on the main line of the Northern Pacific Railway, that all trains passing from the east and west transfer at this point, and that many disreputable persons congregate in and about this station, and especially on winter nights. The station is outside of the corporate limits of the town. The plaintiff entered the station about 11 o'clock at night, and purchased a ticket for Covington, and was in the waiting room awaiting his train, which was due in a few minutes. Mr. Edward James was the agent in charge of the station. During that day a number of persons, who were described as undesirable persons and who were not passengers, had been in and about the station. The night was cold, and these persons had persisted in coming into the station and congregating about the stove. These persons were ordered away from the premises by the agent. It is not shown that the plaintiff was one of these persons, or that he knew that any of them had been ordered away. About 11 o'clock at night the agent by telephone called Mr. Roehl who was town marshal of Auburn and a deputy sheriff of the county of King, to come to the station. Mr. Roehl, in response to this call, came to the station, and was informed by the agent that there were a

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number of undesirable persons in the waiting room, who had not purchased tickets and who did not intend to do so, and that he desired such persons ejected. The agent also informed Mr. Roehl that several persons there held tickets. Mr. Roehl then told Mr. James to go into the waiting room and notify all persons who did not have tickets, and who did not intend to purchase tickets, to leave. The agent then, followed by Mr. Roehl, went from his office to the waiting room, and quietly requested one or two persons to leave. At the same time Mr. Roehl began to push several persons from the room, among whom was the plaintiff. Mr. Roehl struck the plaintiff a blow on the neck with his hand or fist. About this time Mr. James, the agent, saw what Mr. Roehl was doing, and told him that the plaintiff had purchased a ticket. Mr. Roehl then made no further effort to eject the plaintiff.

It is argued by the appellant railway company, in substance, that Mr. Roehl was not the agent of the company, and was acting in his capacity as a peace officer, and that, if he was the agent of the company, he acted wholly outside of the scope of his authority when he assaulted the plaintiff. We think both of these contentions are untenable. Mr. James was the regularly employed agent of the company, and had charge of the station. He called Mr. Roehl to his assistance in order to eject some persons from the building. Mr. Roehl was a peace officer in that vicinity, but upon this occasion he acted at the request of Mr. James. He was assisting the agent, and the company was bound by his acts as the acts of the agent. There is no claim that any of the persons in the station were misbehaving, or were rude or offensive in any way in the presence of Mr. Roehl, except that they were occupying seats within the station in order to keep warm. Under these circumstances, it was the duty of the agent to know, and to inform Mr. Roehl, who the passengers were in the station, and who were entitled to remain. If the agent had personally committed the assault, the company would clearly be liable. The fact that it was committed by one who was called in by the agent would not relieve the company, unless such person acted wantonly without the scope of his authority. It is true the agent had told Mr. Roehl that he would notify those to leave who were not entitled to remain, and that while he was doing so Mr. Roehl assumed that the plaintiff had been, or would be, notified, and assaulted him. Up to this time the plaintiff did not know what the agent or Mr. Roehl desired. The plaintiff, being a passenger, was entitled to protection, and, when it was shown that he was assaulted by one acting at the request of an agent of the company, this clearly made a *prima facie* case to go to the jury, for it was the duty of the agent to notify the person called to his assistance who the passengers were before permitting him to make an assault, and such failure was at least neg-

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ligence. The record does not show the exact number of passengers in the room, but it shows there were not many, probably not to exceed five or six; so that it would have been a simple matter to have pointed them out to Mr. Roehl. In this way the assault upon the plaintiff would have been avoided. There was no error, therefore, in submitting the case to the jury.

In the course of the instructions to the jury the court said: "I charge you that a person that goes within one of the depots of a railroad company, and there purchases a ticket, and is compelled to wait until the coming of a train to transport him from that depot provided by the defendant company, that he at once becomes a passenger, and that it is the duty of the company then to use as against its own machinery and its own employees toward him the highest degree of care for his protection and safeguarding." After the jury had retired, the court recalled the jurors, and said to them: "My attention has been called to my phraseology in my instruction given to you respecting the duty of the railroad company to exercise toward its passengers the highest degree of care. That was given to you without any qualifying words. You are to understand by the terms 'highest degree of care' that it means the highest degree of care compatible with the safe and reasonable conduct of its business. The railroad company is not an insurer to any passenger that they will not be assaulted, that they will not have accidents, but the law does hold them to the exercise as against its own machinery and appliances, its cars and the operation of its road and the conduct of its employees, to the exercise of the highest degree of care compatible with the conduct—the ordinary conduct and course of its business that a reasonably prudent man would give." It is argued by the appellant that this instruction is erroneous, because it injects into the case the question of care in regard to the use of machinery and appliances, when there was no such issue in the case; and also because the degree of care in regard to passengers waiting at a station is ordinary care, and not the highest degree, as is required in the use of machinery and appliances and the operation of trains. There was no necessity for the court to make any reference to machinery or appliances, for there was no issue in regard thereto. But it is plain that no prejudicial error can be based thereon, for the issue was clear and well understood by the jury that the want of care complained of was on the part of the agent of the company. There was no other contention. The reference by the court to machinery and appliances did not, and was not intended to, inject any other issue into the case. The instruction under consideration, in substance, charges that it was the duty of the appellant to use the highest degree of care for the protection of its passengers against the conduct of its employees, and that the highest degree of care meant the highest degree of care "that an ordinarily prudent

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man would give" in the ordinary conduct of his business. In other parts of the instructions the court, in a number of instances, told the jury, in substance, that the plaintiff could not recover if the railway company used reasonable care to prevent the assault, and such like expressions.

But, assuming that the court meant to instruct the jury by this instruction that the railway company was bound to use the highest degree of care to prevent the assault, we think the instruction was not error. The rule is stated in 6 Cyc. p. 600, as follows: "The duty of the carrier to protect the passenger must be discharged by means of servants engaged in carrying out the transportation contracted for. Therefore, if any servant of the carrier while thus engaged assaults a passenger or otherwise infringes the rights of protection to which he is entitled, the carrier is liable irrespective of whether the servant in the thing done was acting for his master or for his own purposes. * * * So long as the passenger is being transported or is on the carrier's premises legitimately in connection with such transportation and the servant is there employed about the business of the carrier in his relation to a passenger, the duty exists." It is conceded in this case that the respondent had purchased his ticket, and was rightfully in the waiting room, and was orderly. He was therefore a passenger, entitled to protection as such. If Mr. James, the agent in charge of the station, had made the assault himself, there could be no question of care in the case, and no doubt about respondent's right to recover. The fact that Mr. James called Mr. Roehl to his assistance in removing persons who were not passengers did not relieve the appellant of the positive duty to protect the passenger from assault by its employees. Mr. James was required, therefore, not only to notify Mr. Roehl who the passengers were, but to prevent his assault upon the passengers. Mr. Roehl, for the purpose of clearing the waiting room in question, was acting in the place of the agent. He was not a third party for whose acts the company was bound to use only ordinary care to prevent injury, as in the cases cited in the appellants' brief. The cases do not appear to be in harmony upon the question of the degree of care owing by a carrier to a passenger, in regard to the safety of its stations and facilities. Some of the cases hold that ordinary care only is required, while others hold that the highest degree of care is necessary. The case of *Railroad Company v. Hagbald*, 72 Neb. 773, 101 N. W. 1033, 106 N. W. 1041, 4 L. R. A. (N. S.) 254, a case decided in the state of Nebraska, cites many of the cases upon that question, but we are of the opinion that, under the conceded facts in this case, if the question of care is to be considered at all, the agent of the company was bound by the highest degree of care, and the instruction was not error.

We are satisfied, however, that the verdict was excessive. No

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serious personal injury was inflicted upon the respondent. He suffered pain for about 36 hours, and also some inconvenience for about 30 days. But he suffered no pecuniary loss or loss of time. After the agent discovered that Mr. Roehl had struck the respondent, he called attention to the fact that a mistake had been made, and no further effort was made to eject respondent from the station, or to further assault him. It is apparent that \$500 would be ample compensation for the injury.

The questions presented by the appeal of Mr. Roehl are the same as the ones above considered, and need not be considered further. The judgment appealed from is reversed, and the cause remanded, with directions to grant a new trial unless the respondent within 30 days after the remittitur is filed in the lower court shall remit \$500 from the verdict, in which event the judgment will stand affirmed for \$500. Appellants to recover the costs of this appeal.

RUDKIN, C. J., and CROW, PARKER, and DUNBAR, JJ., concur.

ST. LOUIS & S. F. R. CO. v. CALDWELL.

(Supreme Court of Arkansas, Jan. 24, 1910.)

[124 S. W. Rep. 1034.]

Carriers—Injury to Passenger—Negligence—Defective Depot Approach.*—An approach, which was for many years generally used by passengers in going to and from defendant's depot, ran along the right of way between a spur track, and an unprotected hole 18 feet wide and 12 to 20 feet deep on the property of another; the hole being about 25 feet from the station and 12 feet from the edge of the track. A passenger got off a train in the nighttime at the station, and started along the approach to the street with which it connected, and, in stepping to one side to permit a person with a lantern to pass, fell into the hole, and was injured. Held, that the facts warranted a finding of negligence in not protecting the approach by a fence.

Carriers—Injury to Passengers—Jury Question—Contributory Negligence.—Whether plaintiff was guilty of contributory negligence was a jury question.

Carriers—Injury to Passenger—Duty of Carrier—Approaches.*—Railroad companies must keep in a reasonably safe condition all

*For the authorities in this series on the subject of the liabilities of railroad companies, as carrier of passengers, for injuries resulting from defects in station or depot premises, see extensive footnote of Missouri, etc., Ry. Co. v. Griswell (Tex.), 29 R. R. R. 673, 52 Am. & Eng. R. Cas., N. S., 673; Moriarty v. Boston & M. R. R. (Mass.), 34 R. R. R. 227, 57 Am. & Eng. R. Cas., N. S., 227; Illinois

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parts of their platforms and approaches thereto to which the public does or would naturally resort and all parts of their station grounds reasonably near the platform where passengers would naturally or ordinarily go to board cars or after alighting.

Carriers—Injury to Passenger—Duty of Lessee.†—Both under the policy of the statutes and independent thereof, the operating lessee of a railroad must exercise care to protect passengers and others having a right upon its depot premises by keeping such premises and the approaches thereto in a reasonably safe condition.

Evidence—Best Evidence—Secondary Evidence—Collateral Matters.—In an action against a railroad company for injuries to a passenger by falling into a hole on another's land, adjacent to an approach to the depot, the admission of a certified copy of a deed showing the width of the company's right of way at that point related to a collateral matter, so that it need not be shown that the original was not obtainable before introducing the certified copy.

Appeal from Circuit Court, Sebastian County;—Daniel Hon, Judge.

Action by J. H. Caldwell against the St. Louis & San Francisco Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

W. F. Evans and B. R. Davidson, for appellant.

Mechem & Mechem, for appellee.

MCCULLOCH, C. J. Appellee sues to recover damages resulting from personal injuries received by falling into an unprotected hole or pit in one of the approaches to the railroad station of appellant at the town of Huntington, Ark. He recovered a verdict for damages, and appellant has brought the case here for review.

It is alleged in the complaint that appellant, for several years prior to the time appellee was injured, negligently permitted a large and deep hole or excavation with perpendicular sides to remain open and unprotected on its right of way in close proximity to the principal approach to the station at Huntington; that said approach was along and over the right of way, and was then being used and had for several years been used by the traveling public, with the knowledge and consent of appellant in going to and from the station; that appellee was unacquainted with the approach and hole, and that in debarking from a train and

Cent. R. Co. v. Daniels (Miss.), 34 R. R. R. 196, 57 Am. & Eng. R. Cas., N. S., 196; first foot-note of Merryman v. Chicago G. W. Ry. Co. (Iowa), 27 R. R. R. 94, 50 Am. & Eng. R. Cas., N. S., 94.

†For the authorities in this series on the question whether a lessee railroad is liable for its own negligence, see first foot-note of Floody v. Chicago, etc., Ry. Co. (Minn.), 34 R. R. R. 133, 57 Am. & Eng. R. Cas., N. S., 133.

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going from the station in the nighttime he followed the lead of other passengers along the approach, and, without negligence, stepped or fell into the hole, and was injured. Appellant in its answer denied all the allegations of the complaint, and pleaded that appellee's injury resulted from his own negligence.

The evidence adduced by appellee was sufficient to establish the following state of facts: At Huntington, Ark., there is a passageway or approach along the railroad right of way parallel with the tracks, running from one of the principal streets to the railroad station. This was openly and generally used by passengers going to and from the station, and had been so used for many years. The tracks and approach were on a high dump. There had originally been a spur track built by a coal mining company from the main track of the railroad to a coal mine; but the mining company had many years before abandoned the track and a part of it had been used by the railroad company as a spur track, running parallel with the main track. The approach runs along between the spur track and the edge of the dump. The hole was made by the mining company, being called a "strip pit," and is 50 to 100 feet wide, and 12 to 20 feet deep, running parallel with the tracks. It is about 75 feet from the station and 12 feet from the edge of the track—the approach or passageway running between. The hole was unprotected, and the side next to the approach was perpendicular. On the night in question, appellee debarked from the passenger train, and started, with other passengers, to go along the passageway to reach the street. It was dark, and he stepped to one side in order to let a man pass who was coming up behind him with a lantern, and in doing so he fell into the pit and sustained personal injury. The evidence was sufficient to warrant a verdict in appellee's favor.

This court has stated the law on this subject to be as follows: "As a general rule, railroad companies are bound to keep in a safe condition all portions of their platforms and approaches thereto, to which the public do or would naturally resort, and all portions of their station grounds reasonably near to the platform, where passengers, or those who have purchased tickets with a view to take passage on the cars, or to debark from them, would naturally or ordinarily be likely to go." *Railway Co. v. Orr*, 46 Ark. 182. See, also, *St. L., I. M. & S. Ry. Co. v. Dooley*, 77 Ark. 561, 92 S. W. 789. Appellant was a lessee, operating a leased railroad, and the pit was dug during the holding of its lessor; but this does not affect the question of its liability for negligent failure to exercise care to protect its patrons and passengers and others who have a right to come upon its premises. 1 Elliott on Railroads, § 471; volume 3, § 1134. This duty rests upon the operating lessee of a railroad independent of any statute; but it is clearly the policy of our statutes

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to impose upon such a lessee all the duties imposed on the proprietor. *St. L. & S. F. R. Co. v. Hale*, 82 Ark. 175, 100 S. W. 1148.

Appellant relies on *Fordyce v. Russell*, 59 Ark. 312, 27 S. W. 82, and like cases, holding that, in order to hold a railroad corporation liable for damages to adjoining lands resulting from a nuisance created by its predecessor, it must be shown that the last company had done some affirmative act adopting the nuisance, and that the mere failure to remove the nuisance does not create liability. This doctrine cannot, however, be invoked to relieve a railroad company from its duty to protect the public, and particularly its patrons and passengers. Even if appellant had no right to fill the abandoned pit on the property of the mining company, it should have protected the passageway by a fence or railing at the place where it abutted on the pit, so as to guard travelers from the danger. At least, if the exercise of care for the safety of travelers required it, then appellant should have done that, and the jury were warranted in finding that it was negligence not to do so. There was some evidence to the effect that the town authorities constructed the passageway, but it was on the railroad right of way, and that did not absolve the railroad company from its duty to exercise ordinary care in freeing from danger the passageway which was an approach, on its own premises, to the station, and was habitually used by its patrons in passing to and from the station.

The question of contributory negligence was properly submitted to the jury, and the question was one of fact for the jury to decide whether or not appellee was guilty of negligence under the circumstances described.

Appellee was allowed, over appellant's objection, to introduce in evidence a certified copy of a certain deed to the Little Rock & Texas Railway Company, appellant's lessor. This was done to show the width of the right of way, and objection was made on the ground that no foundation was laid for the introduction of the record by first showing why the original deed could not be produced. The deed related to a collateral matter, and did not form the basis of the cause of action, and therefore its introduction did not fall within the rule that secondary evidence should be excluded unless proof is made that the primary evidence was not obtainable. 17 Cyc. 469.

The instructions of the court were in accord with the law as here announced, and we find no error in giving instructions or in the refusal of those requested by appellant.

Affirmed.

OUELLETTE v. GRAND TRUNK RY. CO.

(Supreme Judicial Court of Maine, Nov. 24, 1909.)

[76 Atl. Rep. 280.]

(Official Syllabus.)

Carriers—Carriage of Passengers—Negligence—Stopping Train on Siding.*—Negligence on the part of railroad company is not to be inferred from the mere stopping of its train on a side or passing track, to permit another train to pass, without informing the passengers that the stop is not at a station platform when no station had been called, and no attendant circumstances existed calculated to induce a passenger to conclude that the stop was at the usual and proper landing place.

Carriers—Injury to Passenger—Negligence.—It is not the act of a reasonably prudent man, accustomed to railroad travel, to step from a car into black darkness under a supposition that the car is then at the usual place provided for the landing of passengers. The very darkness itself should be sufficient warning that the station is not there.

Evidence Insufficient.—Where, in an action on the case to recover damages for personal injuries sustained by the plaintiff and caused by the alleged negligence of the defendant, the verdict was for the plaintiff, held: (1) That the evidence was not sufficient to establish negligence on the part of the defendant; (2) that the plaintiff failed to prove affirmatively that he was in the exercise of reasonable care; (3) that the exceptions to the refusal to direct a verdict for the defendant must be sustained.

Negligence—Action for Personal Injuries—Burden of Proof.—In an action to recover damages for personal injuries sustained by the plaintiff and caused by the alleged negligence of the defendant, it is incumbent upon the plaintiff to affirmatively prove at least two propositions: (1) That his injuries were caused by the negligence of the defendant; (2) that no failure to exercise reasonable care on his part contributed to bring about his injuries.

Appeal and Error—Review—Exceptions to Refusal of Directed Verdict for Defendant.—Exceptions to the refusal to direct a verdict for the defendant raise the same question as to the sufficiency of the evidence to sustain a verdict for the plaintiff as would be raised by the usual motion for a new trial, except as to the amount of damages.

*For the authorities in this series on the question what constitutes an invitation to a passenger to alight from a train or street car, see last foot-note of *Powers v. Connecticut Co.* (Conn.), 34 R. R. R. 434, 57 Am. & Eng. R. Cas., N. S., 434.

For the authorities in this series on the subject of the duty of the carrier to announce that the stoppage of the train is not to allow passengers to alight, see second foot-note of *Kansas City Southern Ry. Co. v. Davis* (Ark.), 29 R. R. R. 664, 52 Am. & Eng. R. Cas., N. S., 664.

Ouellette v. Grand Trunk Ry. Co

Exceptions from Supreme Judicial Court, Androscoggin County.

Actions by Vital Ouellette against the Grand Trunk Railway Company. Verdict for plaintiff, and defendant brings exceptions. Sustained.

Defendant excepted to the refusal of the presiding justice to direct a verdict for the defendant, and also to his refusal to give certain requested instructions.

Argued before WHITEHOUSE, SAVAGE, SPEAR, CORNISH, KING, and BIRD, JJ.

Newell & Skelton, for plaintiff.

C. A. & L. L. Hight, for defendant.

KING, J. Action to recover damages for personal injuries sustained by the plaintiff through the alleged negligence of defendant. Verdict for plaintiff for \$4,800. The case comes to the law court on defendant's exceptions to the refusal of the presiding justice to direct a verdict for the defendant and his refusal to give certain requested instructions. The exceptions to the refusal to direct a verdict for defendant raise here the same question as to the sufficiency of the evidence to sustain a verdict for plaintiff as would be raised by the usual motion for a new trial, except as to the amount of damages. To entitle the plaintiff to a verdict it was incumbent upon him to affirmatively prove at least two propositions:

(1) That his injuries were caused by the negligence of the defendant, and (2) that no failure to exercise reasonable care on his part contributed to bring about his injuries.

There is but little conflict in the testimony so far as it relates to those propositions.

On February 6, 1908, the plaintiff was a passenger on defendant's train from Lewiston, Me., to Berlin, N. H. At Gorham, an intermediate station, this train crossed another train from Montreal to Portland. There were at the time at least two parallel tracks at this station extending practically east and west, with the station platform on the north. The Portland train was on the main track next to the platform heading east. The plaintiff's train on approaching Gorham took the first passing track next to the main track, and stopped at a point overlapping somewhat the easterly end of the other train. The plaintiff was seated in the forward end of the "smoker" facing the rear of the car. He testified that he was "kind of half asleep," or "dozing," and just as his train was coming to a stop on the passing track he heard some one call "Berlin station," when he immediately took his grip and coat, left the car by the forward platform, stepped down and off the steps on the right-hand side, supposing, as he put it, "I was getting off on the station platform," and was in-

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stantly struck by something and rendered unconscious. No one saw the accident. After the Portland train passed on east, and the plaintiff's train had backed over the switch onto the main track and pulled up to the platform, the plaintiff was found unconscious and severely injured lying in a hole in the snow at the switch, 200 or 300 yards east from the platform in front of the station.

The plaintiff did not see any person who called "Berlin station," and could not say it was a trainman; nor was there any other evidence that such a call was made, and there was no reason for such a call to be made, as Berlin station had not been reached. But whether the plaintiff heard such call in fact, or in dream, he undertook to alight from the train while it was on the passing track, and in so doing was injured and carried to the place where found by one on the other train. The distance between the outside rail of the main track and the inside rail of the passing track was 7 feet 10 inches, and the space between cars standing abreast on those tracks about 4 feet. It is not made certain by the evidence if the forward end of the smoker had passed by the engine of the Portland train. The plaintiff gave no testimony as to this. In his declaration, however, he alleged that it had not, and "that the plaintiff, alighting as aforesaid, * * * started across said tracks to said station platform and was then and there struck by said" Portland train "leaving said station, hurled a great distance through the air, thrown violently upon the ground, and left unconscious with a broken leg," etc.

Mr. Leader, a passenger for Gorham on the Berlin train, passed through the smoker to a rear car just before the train stopped, and saw the plaintiff "apparently dozing in the seat as I went by, and I kind of slapped him like that (indicating), and said good-bye." Plaintiff knew Mr. Leader was to stop at Gorham. Leader alighted from the rear platform of the rear car and crossed the main track in front of the engine of the Portland train. The headlight of that engine was burning. He was not certain if there was more than one car in the rear of the smoker; but the rear end of the Berlin train was "surely a car length, if not better," east of the pilot of the engine of the Portland train. It had been storming during the day and was snowing some when the train reached Gorham at 5:26 p. m.

The plaintiff thus described in testimony what he did in getting off the train: "A. I took hold of my grip and coat and started out. Q. Describe where you went and how you went? A. I can't very well describe. All I can say I just had time to put hardly my face out when I was struck. Q. You went out on the platform? A. Yes, I went out on the platform. Q. Then what did you do? A. I was struck by the car. Q. When you were on the platform, or did you step down? A. No, I

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stepped down. * * * Q. And was it dark or light? A. Dark."

On cross-examination plaintiff was asked: "Q. Did you get your feet on the ground? A. Yes, sir. Q. Did you take a step forward? A. No, sir; I didn't have a chance to take it. I didn't know there was anything there. Q. Do you know whether you did take a step forward or not? A. I know I didn't."

There was no evidence that Gorham station had been called or announced in any way before or at the time the train stopped on the passing track.

The gist of the plaintiff's alleged cause of action is that it was the duty of the defendant to inform him that the train had not stopped at the station platform, and to warn him of the dangers incident to alighting from the train where it then was.

If it was not reasonable to be expected in the actual course of events that the plaintiff might attempt to alight from the train when it stopped on the passing track, then there was no duty imposed upon the defendant to warn him not to alight. Was his act of alighting there reasonably to be expected under the facts and circumstances as disclosed? We think not. The train had not reached his destination, Berlin, and nothing had been done by defendant to cause him to think so; neither had the train reached the place provided for passengers to alight at the intermediate station, Gorham, and no call or announcement of that station had been made, and nothing appears to have been done by the defendant which might cause the plaintiff to think the stop was at the station, other than the actual stopping of the train; nor was the stop at a place where, so far as it appears, passengers were even known by defendant to leave the train, or ever did leave the train, as was the fact in *Boss v. Providence & W. R. Co.*, 14 R. I. 149, 1 Atl. 9.

The only ground, then, upon which it can be contended that the plaintiff's act in leaving the train as he did was reasonably to be expected, is the fact that the train did stop without notice to him that it was not at a station platform.

There are many cases which hold that where, after a station had been called, and the train either stopped short or overran, and a passenger in the exercise of due care was injured in alighting in a dangerous place, the company may be found negligent, and for the reason that the act of calling the station as the next stop, and then stopping the train without giving warning that the station is not reached, are acts of the company from which in the light of attendant circumstances negligence may be found.

But no authority has been called to our attention, and we have found none, in support of the proposition that negligence on the part of a railroad company may be inferred from the mere stopping of its train on a side or passing track, without in-

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forming the passengers that the stop is not at a station platform, when no station had been called or announced, and no attendant circumstances existed calculated to induce a passenger to conclude that the stop was at the usual and proper landing place.

Moreover, it is important to be noted in this case that the fact that the plaintiff had fallen asleep was undoubtedly the real cause of his misfortune. Disturbed in his dreamy slumber, he erroneously concluded that the train had reached his destination, Berlin station. He was familiar with the route, and knew that his friend, Leader, who bade him "good-bye" as the train was stopping, was to leave the train at Gorham. It is manifest that if he had not been sleeping he would not have concluded that this stop was at Berlin, instead of on the passing track at Gorham, but would have known and appreciated where the train was. It was not the duty of the defendant to keep him awake. Though a passenger, he was, nevertheless, free to indulge in sleep if he desired; but if that indulgence was the cause of the damage for which this action is brought—and we think it was—he must bear it, and not the defendant.

Again, the plaintiff failed to prove affirmatively that he exercised reasonable care in leaving the train. Such care required him to look where he was alighting, and to observe the situation so far as it could be observed, and to control his actions accordingly. If it be true, as alleged in his writ, that his car was stopped at a point east of the engine of the Portland train, and that he was struck by that train in crossing the main track, then he alighted in the face of the headlight of that engine, which must have revealed to him, if he looked, the situation, and that his train was not at the station. If without looking, and heedless of the obvious danger, he undertook to cross in front of the engine, his act was not only negligent, but reckless.

If, on the other hand, as his testimony indicates, he stepped from the car into utter darkness, then certainly he must be charged with a lack of reasonable care, for the darkness was apparent, and observed by him. He said: "I couldn't see anything before me."

It is not the act of a reasonably prudent man, accustomed to railroad travel, to step from a car into black darkness under a supposition that the car is then at the usual place provided for the landing of passengers. The very darkness itself should be sufficient warning that the station is not there.

It is, therefore, the opinion of the court that the evidence was not sufficient to sustain a verdict for the plaintiff, and that the defendant's exceptions to the refusal to direct a verdict in its favor must be sustained.

The other exceptions are not considered. The entry will be:

Exceptions to refusal to direct a verdict for defendant sustained. New trial granted.

PATTERSON'S ADM'R v. LOUISVILLE & N. R. Co.

(Court of Appeals of Kentucky, June 10, 1910.)

[128 S. W. Rep. 1068.]

Carriers—Injury to Passenger on Car Top—Liability of Carrier.—

At the place from which a free train of 14 cars was to run, the cars being crowded, a number of persons, with the acquiescence of the conductor, went to the tops of the cars. By the jerking and bumping of the cars, caused by the slack being taken up as the train slowed down on reaching its destination, and without any negligence in its operation, two of such persons were thrown from the train. Held, that this was due simply to a risk they had assumed, so that the carrier was not liable.

Appeal from Circuit Court, Bell County.

Action by Charles Patterson's administrator against the Louisville & Nashville Railroad Company. Judgment for defendant. Plaintiff appeals. Affirmed.

Leadbow & De Busk and *Henritze & Dawson*, for appellant.

Benjamin D. Warfield, C. W. Metcalf, and J. W. Alcorn, for appellee.

HOBSON, J. On April 21, 1908, a special train was run from Middlesboro to Pineville to take persons to a political convention held at Pineville on that day. No fares were collected on the train, and, as everybody went free, there was a considerable crowd. The train consisted of three or four passenger cars, four or five cabooses, and four or five freight cars; there being in all fourteen cars in the train. The cars were full, and a number of persons were riding on the top of the train when it pulled out from Middlesboro. Pineville is 12 miles from Middlesboro, and the persons on top of the train were riding on top of the cabooses or the freight cars. Charles Patterson, a coal miner 22 years old, was one of those on top of the cars. All went well until they reached Pineville. As the train was pulling into that station, it took up the slack, causing the rear cars of the train to jerk, and Patterson, who was riding on one of the rear cars, was by the jerk thrown therefrom and fell into Straight creek and was drowned. This action was brought to recover for his death; and at the conclusion of the evidence for the plaintiff the circuit court instructed the jury peremptorily to find for the defendant. The plaintiff appeals.

Some 10 or 15 witnesses were introduced by the plaintiff. They were on the train and felt the jerk. The sum of their testimony is that there was a considerable jerk of the train caused by the slack being taken up as it pulled up from Straight creek into the station. But, as there were 14 cars in the train and it

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was practically a freight train, on account of the number of cars that were in it, such a jerk was unavoidable, and was such as was fairly incidental to the operation of such a train when the slack was taken up. While there is some proof in the record that the train was operated roughly on the journey, the proof of all the witnesses as to what occurred at the time Patterson fell off is to the effect that the jerk was due to the taging up of the slack; that the train was pulling into the station, and was running at a reduced speed. There is nothing in the record to show that the jerk was greater than was incidental to the movement of such a train, or that it was due in any measure to a want of care on the part of those in charge of the train. There is nothing in the record to show that the jerk was more violent than should have been anticipated by a person of ordinary prudence riding on such a train.

The plaintiff proved by one witness that he was on the station platform at Middlesboro with a number of others; that, while they were standing around there, the conductor said to them, "Boys, crowd it, crowd the train, go to the top;" that the witness then went to the ladder and went up on top of one of the cars, and that Charles Patterson came up right behind him. It is insisted that, as Patterson went up on the cars in obedience to what the conductor said, he was not guilty of contributory negligence in doing so, and that the company is therefore liable for his death. In support of this we are referred to the case of Indianapolis, etc., R. R. Co. v. Horst, 93 U. S. 291, 23 L. Ed. 898. In that case a stock drover who had a right to transportation on a freight train which carried his cattle was riding in the caboose, and, when they had reached a certain point, the conductor in the night waked him up, telling him that they were going to leave the caboose there, and that he would have to ride to the next point on the top of the cars. He, at the request of the conductor, got on top of the cars, and thus rode about three-fourths of a mile, when they undertook to couple the other caboose to the train, and in making the backward movement gave the train a terrible bump which knocked the drover from the top of the car upon which he was riding. A recovery was sustained. But in that case the drover was required by the conductor to get upon the top of the car. He had to do this, or let his cattle go on without him. He had entered upon his journey, and was entitled to transportation as a passenger. The conductor was wrong in requiring him to leave the caboose and get on top of the car. But here the conductor required nobody to get on top of the car. His language meant that they must crowd the train or go on top. He required nobody to go on top, and the deceased and his companions evidently went on top of the train because they thought it was pleasanter riding there

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than in the crowded cars. It is true the conductor knew they were up there, and acquiesced in their riding there, but he did not require them to ride there, and when they voluntarily rode on the top of such a train, they took the risk of such jerking and bumping as are fairly incidental to the operation of the train run without negligence. The falling of the deceased from the train was due to the taking up of the slack when the train was not running at an unusual speed, and it does not appear that anything was omitted by those in charge of the train which they should have done. One of the plaintiff's witnesses who was one of the companions of the decedent on the train, being asked how the men happened to be on the top of the cars, said: "Why, they just climbed up. I don't know that anybody said climb on top. They just commenced going on top, and it seemed that all the coaches were full. Now, I couldn't say rightfully that they were obliged to go on top, but they just like to ride on top. A great many men love to ride on the top of the train." There were according to the evidence about 100 men on the top of the train. Only two of them fell off. The deceased, like the others who were with him, evidently went to the top of the train because he preferred to ride there rather than in the crowded cars. In doing so he took the risk due to this mode of travel, and there can be no recovery here in the absence of proof showing that the jerk from which he fell off was so violent as to show a want of proper care in the operation of the train. This does not appear. We therefore conclude that the death of the deceased was simply due to an accident from a risk which he had assumed in riding upon the top of the train, and that the circuit court properly instructed the jury peremptorily to find for the defendant.

Judgment affirmed.

ST. LOUIS, I. M. & RY. CO. *v.* HARTUNG.

(Supreme Court of Arkansas, May 23, 1910.)

[128 S. W. Rep. 1025.]

Carriers—Passengers—Mixed Trains—Duty of Carrier.*—A carrier accepting passengers on mixed trains must use the same care required in protecting passengers on regular passenger trains.

Carriers—Passengers—Mixed Trains—Duty of Carrier.†—A carrier of passengers on mixed trains must furnish reasonably safe means of entering the cars and hold them in a reasonably safe manner for a reasonable time to permit passengers to enter with safety, and is liable for injuries caused by a negligent starting of the train.

Carriers—Injury to Passenger—Boarding Trains—Contributory Negligence.—The reasonable promptness on the part of a passenger in entering a train depends largely on the particular circumstances, including his physical ability, his incumbrance with baggage, and his being accompanied by those dependent upon him for attention.

Carriers—Passengers—Boarding Trains—Jury Questions.—In an action against a railway company for injuries to a passenger, held, under the evidence, a jury question whether plaintiff acted with reasonable promptness in boarding the train. •

Carriers—Passengers—Mixed Trains—Duty to Carry.*—The rule that carriers are liable for even a small degree of negligence causing injury to a passenger, and are required to use the highest degree of practicable care, diligence, and skill in operating their trains to prevent such injury, applies to mixed trains.

Appeal and Error—Objections in Trial Court—Instructions.—Objections to the verbiage of an instruction should be specifically called to the trial court's attention.

Carriers—Passengers—Duties of Carriers.—A railway company operating a mixed train standing at a station to receive passengers must anticipate the presence of boarding passengers.

Carriers—Passengers—Mixed Trains—Contributory Negligence.‡—A passenger is not guilty of contributory negligence per se in standing in a mixed train.

Trial—Instructions—Assumption of Facts.—An instruction, in an action for injuries to a passenger on a mixed train, that an unusual and unnecessary violent jar of a mixed train is evidence of negligence, and that a passenger on a mixed train is not necessarily negli-

*See extensive note, 1 R. R. R. 7, 24 Am. & Eng. R. Cas., N. S., 7.

†See last foot-note of *Boston Elevated Ry. Co. v. Smith* (C. C. A.), 32 R. R. R. 551, 55 Am. & Eng. R. Cas., N. S., 551; last foot-note of *Norfolk & W. Ry. Co. v. Rhodes* (Va.), 31 R. R. R. 417, 54 Am. & Eng. R. Cas., N. S., 417.

‡See first foot-note of *St. Louis, etc., Ry. Co. v. Gilbreath* (Ark.), 32 R. R. R. 201, 55 Am. & Eng. R. Cas., N. S., 201.

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gent in standing, was not prejudicial error as assuming the existence of the facts therein recited.

Appeal and Error—Review—Invited Error—Instructions.—One who obtains instructions singling out facts on an issue cannot complain of an instruction of that kind.

Damages—Mental Anguish—Evidence—Sufficiency.—Evidence, in an action for injury to a railway passenger, held sufficient to show mental suffering.

Damages—Personal Injuries—Recovery Not Excessive.—\$2,500 was not an excessive recovery for injury to a railroad passenger thrown with great force against iron brakes and rails, where her breast was injured, the skin was torn from her arm from the wrist to the elbow, the muscles of her shoulder were badly wrenched, she suffered pain for more than 1½ years, and after consulting a physician and a specialist still endured pain at the time of trial.

Appeal from Circuit Court, Phillips County; Hance N. Hutton, Judge.

Action by Mrs. Grace Hartung against the St. Louis, Iron Mountain & Southern Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

W. E. Hemingway, E. B. Kinsworthy, P. R. Andrews, and Jas. H. Stevenson, for appellant.

J. M. Jackson and Bevins & Mundt, for appellee.

FRAUENTHAL, J. This was an action instituted by Mrs. Grace Hartung, the plaintiff below, against the St. Louis, Iron Mountain & Southern Railway Company to recover damages on account of personal injuries which she alleged she sustained while a passenger upon one of defendant's trains. The defendant ran a mixed train from Watson to Helena, two stations upon its line of railroad, in which it carried passengers and freight. The testimony on the part of the plaintiff tended to prove that she had paid her fare and was entering the defendant's train as a passenger at Watson for Helena. In the train were two passenger coaches, and some freight cars were being switched for the purpose of putting them in the train. The train was preparing to leave, and passengers were entering the train. The plaintiff was accompanied by her baby, which was in the arms of her husband as she first entered the coach. She deposited some bundles upon the seat and then returned at once to the platform of the coach to take the baby from her husband. As she was thus standing on the coach platform, the engine backed three flat cars loaded with timber against the passenger coach, with great and unnecessary force and violence, so that, as one of the witnesses testified, it almost lifted the end of the coach off the track. By the greater jar and jolt the plaintiff was thrown across the coach platform on which she was standing and against the brake beam

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and guard rail of the next car, and thereby she was severely injured. Upon the trial of the case the jury returned a verdict in favor of the plaintiff for \$2,500, and from the judgment entered thereon the defendant has appealed to this court.

It is urged by counsel for defendant that, inasmuch as this was a mixed train, the plaintiff was guilty of negligence which contributed to the injury by going on the coach platform after entering the coach, and that on this account she is not entitled to recover, as a matter of law. But the fact that this was a mixed train did not alter or diminish the duty, which was required of defendant as a carrier, to stop its train for such a reasonable time as would permit passengers to go on board with safety. Where the carrier accepts passengers on such mixed trains, the same rules of law will apply to it for the exercise of care in protecting its passengers from injury as apply to it when receiving them on regular passenger trains. In the case of *St. Louis, Iron Mountain & Southern Railway Company v. Brabbzson*, 87 Ark. 109, 112 S. W. 222, it is said: "It is well settled that, though a passenger riding on a freight train must be deemed to have assumed all the risks incident to travel on such trains, yet, where the railway company undertakes the carriage of passengers on freight trains, it owes to such passengers the same high degree of care to protect them from injury as if they were on passenger trains." *Pasley v. St. L., I. M. & S. R. Co.*, 83 Ark. 22, 102 S. W. 387; *Arkansas Central Railroad Co. v. Janson*, 90 Ark. 494, 119 S. W. 648; *Arkansas S. W. Ry. Co. v. Wingfield*, 126 S. W. 76. The carrier of passengers on mixed trains is required, like carriers on regular passenger trains, to furnish reasonably safe means of entering the car, and to hold the car in a reasonably safe manner for a reasonable time to permit those who wish to enter to do so with safety. If, therefore, while the passenger is getting on the car, the train is negligently started, or so negligently handled by permitting other cars to be thrown against it with such violence that the passenger is injured, the carrier will be liable. The time that is allowed a passenger to enter a train depends to a great extent on the particular circumstances of each case and of the passenger; the physical ability of the passenger, his incumbrance with baggage, and his being accompanied by those who are dependent upon him for attention, may all be taken into consideration in determining whether a reasonable time has been afforded the passenger in getting on board the train. 2 *Hutchinson on Carriers* (3d Ed.) § 1111; 6 *Cyc.* 613. In the case at bar the plaintiff was accompanied by her infant child, and she had come to the coach platform to take it from the arms of the father, who was standing on the depot platform. Other passengers were at the time entering the train, and all of them had not entered when the injury occurred. It became a question for the jury to say, under the testi-

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mony in the case, whether the plaintiff went to the car platform without unreasonable delay, and whether she remained on the platform a reasonable time to get her child; if she acted with reasonable diligence to do this, then it cannot be said as a matter of law that she was guilty of contributory negligence which would defeat her right to recover.

The court gave a number of instructions to the jury both at the request of the plaintiff and of the defendant. These instructions fully told the jury that the plaintiff assumed all the ordinary risks and hazards that were incident to the travel on a mixed train, and properly declared to them the care that the law required the plaintiff to exercise as a passenger on such train. Amongst other instructions, it gave the following at the request of plaintiff: "(3) You are instructed that railroad companies are required in the carriage of passengers to use the utmost care and foresight and are held responsible for even a small degree of negligence causing an injury to a passenger, and are required to exercise the highest degree of practicable care, diligence, and skill in the operation of their trains to prevent injury to passengers."

It is urged that the court erred in giving this instruction, because it was not applicable to the carrier of passengers on a mixed train. But we do not think this contention is correct. The duty of a carrier of passengers on a freight or mixed train is thus stated in the case of *St. Louis Southwestern Ry. Co. v. Cobb*, 89 Ark. 82, 115 S. W. 939: "The passenger assumes the risks and hazards that are incident to the operation of a freight train; but the general duty of the carrier to use the utmost care for the safety of the passengers is the same. Freight trains and passenger trains are operated differently; but a freight train carrying passengers cannot be operated carelessly without subjecting the company to liability any more than a passenger train.

* * * In the operation of a freight train the operatives can no more overlook the due care of their passengers, than can the operatives of a passenger train." See, also, *Rodgers v. Railway*, 76 Ark. 520, 89 S. W. 468, 1 L. R. A. (N. S.) 1145, 113 Am. St. Rep. 102; *Pasley v. Railway*, 83 Ark. 22, 102 S. W. 387; *Railway v. Brabbzson*, 87 Ark. 109, 112 S. W. 222; *Railway v. Janson*, 90 Ark. 498, 119 S. W. 648. If there was any defect in the verbiage of the instruction, the defendant should have called the court's attention thereto by a specific objection, so that it could have been corrected in that particular. *St. Louis, Iron Mountain & S. R. Co. v. Richardson*, 87 Ark. 602, 113 S. W. 794.

It is urged that the court erred in giving the following instruction: "(4) You are instructed that a railway company operating a mixed train which carries passengers, and which

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has drawn up to a station for the purpose of receiving passengers, is bound to anticipate the presence of passengers aboard the passenger car and to exercise care not to injure them."

Under the circumstances of this case, we do not think that any error was committed by giving this instruction. The passenger coaches were stopped at the depot, and passengers were at the time entering the train. Preparations were being made for the departure of the train, and the trainmen were bound to anticipate the presence of the passengers going on board of the train under these circumstances. *St. L., I. M. & S. R. Co. v. Harmon*, 85 Ark. 503, 109 S. W. 295; *St. L., I. M. & S. R. Co. v. Gilbreath*, 87 Ark. 572, 113 S. W. 200.

It is urged that the court erred in giving the following instruction: "(5) You are instructed that in the operation of mixed trains jars of great, unusual, and unnecessary violence would be evidence of negligence on the part of the trainmen, and you are further instructed that, as a matter of law, it is not necessarily negligence for a passenger to be standing on a mixed train, but, on the other hand, one has a right to so stand, providing the standing is not so protracted or uncalled for that it becomes unnecessary or imprudent."

The principle of law set out in this instruction is, we think, correct. A passenger is not guilty of negligence per se to stand up in a mixed train. There are circumstances which often arise that justify a passenger in standing up. In the case of *St. Louis, I. M. & Sou. R. Co. v. Gilbreath*, 87 Ark. 572, 113 S. W. 200, it is said: "This court has repeatedly held that it is not necessarily negligence for a passenger on a freight train to stand up, but that it is generally a question for the jury to decide under the circumstances disclosed in each case." See, also, *Railway v. Billingsley*, 79 Ark. 337, 96 S. W. 357; *Pasley v. St. L., I. M. & S. R. Co.*, 83 Ark. 22, 102 S. W. 387; *St. L., I. M. & S. R. Co. v. Harmon*, 85 Ark. 503, 109 S. W. 295; *St. L., I. M. & S. R. Co. v. Richardson*, 87 Ark. 101, 112 S. W. 212; *St. L., I. M. & S. R. Co. v. Brabbzson*, 87 Ark. 109, 112 S. W. 222. Nor do we think the instruction is otherwise prejudicial. We do not think that the fair meaning of the language would indicate that it assumes the existence of the facts therein recited, but that it is in effect hypothetical.

In other instructions given on behalf of the defendant, the court had told the jury fully as to what acts would have constituted contributory negligence on the part of the plaintiff by standing up; and the effect of this instruction was only to tell the jury what acts in that regard would not as a matter of law constitute such contributory negligence. Its effect was still to leave to the jury the province to determine the facts, and whether or not under the circumstances of this case the plaintiff was guilty of contributory negligence in standing up. Inasmuch as the de-

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fendant had requested and obtained the giving of instructions which singled out facts on this issue, we do not think that any prejudicial error was committed by the court in this regard in this instruction.

It is urged by the defendant that the court erred in instructing the jury that the plaintiff could recover for mental pain and anguish as an element of damage. It claims that the evidence shows an entire absence of mental suffering. We do not think that this contention is correct. The evidence shows that the plaintiff, a delicate woman, was thrown with great force and violence across the end of the car and against the iron brakes and rails. Her breast was injured, the skin was torn from her arm from the wrist to the elbow, and the muscles of her shoulder were badly wrenched. She suffered physical pain at the time, and has continued to suffer such pain for more than 1½ years after the injury. A physician of defendant waited on her immediately after the injury, and later she required the attention of another physician. She suffered such rheumatic pains, which were caused by the injury, that she consulted a specialist; and, with all the medical assistance which she obtained, she still endures pains that are a result of the injury. Mental suffering is so intimately connected with physical suffering that mental pain and anguish was necessarily incident to her condition from the injury. *Railway v. Taylor*, 84 Ark. 46, 104 S. W. 551; *Arkansas S. W. Ry. Co. v. Wingfield*, 126 S. W. 76.

There was evidence in the very nature, extent, and circumstances of the injury which was sufficient to sustain an instruction relative to mental pain as an element of the damages. And under the testimony that was adduced in this case as to the nature and extent of the injury we cannot say that the verdict of \$2,500 was excessive.

The judgment is affirmed.

NORVELL *v.* KANAWHA & M. RY. CO.

(Supreme Court of Appeals of West Virginia, May 3, 1910. Rehearing Denied June 11, 1910.)

[68 S. E. Rep. 288.]

(Syllabus by the Court.)

Carriers—Injury to Passenger on Platform—Negligence.*—It is negligence in a passenger, under ordinary circumstances, to stand upon an open platform of a rapidly moving railroad car. If one voluntarily and unnecessarily takes such position and is injured in it he cannot recover damages.

Carriers—Passenger Riding on Platform—Negligence.*—To ride on a car platform is not always a negligent act. If the train is so crowded that one cannot reasonably enter a car, it is not negligent to ride on the platform when the carrier acquiesces in the use of such accommodations by collecting fare for the same or some other indicative act.

Carriers—Carriage of Passengers—Duty Towards Passenger Riding on Platform.†—The carrier owes to a passenger unvoluntarily, necessarily and rightfully riding on the platform the high degree of care commensurate with the circumstances and its act in undertaking to carry him there.

Carriers—Injury to Passenger on Platform—Negligence.—Injury to a passenger while excusably riding on the platform because of the overcrowding of the train usually constitutes a prima facie case of negligence on the part of the carrier.

Carriers—Carriage of Passengers—Duty Towards Passenger Riding on Platform.—The liability of the carrier to one excusably riding on the platform is not absolute. If it used reasonable diligence to provide cars for his safe carriage, and, with fair excuse for failing to provide them, exercised the increased care demanded by the passenger's enforced position on the platform, it is not liable for injury to him.

Carriers—Carriage of Passengers—Injury to Passenger on Platform—Liability of Carrier.‡—If a railroad company negligently and

*For the authorities in this series on the question whether it is contributory negligence in a passenger to ride on the platform of a car, see foot-note appended to *Augusta S. R. Co. v. Snider* (Ga.), 9 R. R. 622, 32 Am. & Eng. R. Cas., N. S., 622; where all those preceding it are collected, last foot-note of *Davis v. Atlanta, etc., Ry. Co. (S. Car.)*, 34 R. R. 249, 57 Am. & Eng. R. Cas., N. S., 249.

†For the authorities in this series on the subject of the degree of care required of a carrier of passengers as affected by the fact that the passenger in question is riding in a dangerous place or position, see second foot-note of *Math v. Chicago City Ry. Co. (Ill.)*, 34 R. R. 206, 57 Am. & Eng. R. Cas., N. S., 206; where all those preceding it are collected.

‡For the authorities in this series on the subject of the negligence of a carrier of passengers in overcrowding cars, see first foot-note of

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unreasonably fails to provide sufficient cars so that passengers are compelled to ride on the platforms and then accepts passengers for carriage in such hazardous places, it is liable for damages to one injured therein, unless he has contributed to the injury by negligence on his part.

Carriers—Liability of Carrier for Conductor's Acts.—The conductor of a train represents the railroad company in relation to the transportation of passengers on his train, and his act in receiving and carrying passengers on the platforms when the train is overcrowded binds the company.

Trial—Direction of Verdict.—The court cannot properly direct a verdict in a case turning on a conflict of evidence which makes the material facts so doubtful that a verdict for either party would be sustained.

Release—Release Executed Through Fraud.—A written release or acquittance of a claim for personal injury will not sustain a plea of accord and satisfaction in the premises if its execution was obtained by deception and fraud.

(Additional Syllabus by Editorial Staff.)

Release—Execution—Fraud—Question for Jury.—Whether a release of liability for injury was obtained by a carrier from a passenger by fraud, held, under the evidence, to be for the jury.

Error to Circuit Court, Mason County.

Action by J. C. Norvell against the Kanawha & Michigan Railway Company. Judgment for defendant, and plaintiff brings error. Reversed, and new trial granted.

Charles E. Hogg and Somerville & Somerville, for plaintiff in error.

Brown, Jackson & Knight, for defendant in error.

ROBINSON, P. Norvell, the plaintiff, riding on a platform of a crowded train, fell therefrom and was injured. He sued the railroad company for damages. The company defended upon the ground that there was no negligence on its part; that plaintiff's injury was caused by his own negligence; and that, at any rate, full accord and satisfaction for the injury had been made. The case came on for trial and all the evidence was adduced before the jury. The defendant moved the court to direct a verdict in its favor. The motion was granted, verdict for the defendant was returned, and judgment upon the same was entered. The plaintiff asks a reversal of that judgment.

Was the case one for jury determination? It is contended that the evidence was conflicting and that therefore the case

Kalis v. Detroit United Ry. (Mich.), 32 R. R. R. 565, 55 Am. & Eng. R. Cas., N. S., 565; *Lobner v. Metropolitan St. Ry. Co.* (Kan.), 32 R. R. R. 473, 55 Am. & Eng. R. Cas., N. S., 473.

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should have been submitted to the jury. The pleadings made the case to involve two main inquiries—whether negligence on the part of defendant in the overcrowding of its cars caused plaintiff's injury, and, if so, whether accord and satisfaction therefor had been made. A conflict of evidence as to each of these propositions is claimed.

It is negligence in a passenger, under ordinary circumstances, to stand upon an open platform of a rapidly moving railroad car. If one voluntarily and unnecessarily takes such position and is injured while there he cannot recover damages. His contributory negligence bars recovery. But to ride in such place is not always a negligent act. Whether it is negligent to ride on the platform may depend on circumstances. If the train is so crowded that one cannot reasonably enter a car, and no safer place on the train is reasonably obtained, it is not negligent to ride on the platform when the circumstances thus force the passenger to do so and the carrier acquiesces in the use of such accommodations by collecting fare for the same or by some other indicative act. What other choice has a passenger but to ride on the platform when the carrier, negligently or unavoidably, fails to provide safer accommodations for him? Must he forego his journey and the engagements dependent upon it, or his return to home at the expected time? It is not reasonable to say that he is obliged to do so. He may accept such accommodations when they are the best offered to him and rely upon the carrier to take the greater care and diligence in transporting him which are commensurate with the increased dangers of the situation in which it has placed him as a passenger. The carrier's duty to him in such situation is to use the high degree of care which its act in undertaking to carry him on the platform demands. If it fulfills that duty, and is free from negligence in other particulars, it may be absolved from damages if he is injured. Its liability for injury to him in the premises is not absolute. But injury to him in such dangerous situation, if he is obliged to take that place of carriage for want of a safer one, may make a *prima facie* case of liability. The liability will not exist, however, when the carrier shows that it exercised reasonable diligence to provide cars for his safe carriage, and, with a fair excuse for failure to provide them, used the increased care demanded by the lack of a safer place for his transportation. Nor will the liability exist when it appears that the passenger, by not conducting himself with the care and prudence which his position on the platform required, did that which was the proximate cause of his injury. Baldwin on American Railroad Law, 309; Moore on Carriers, 856; Hutchinson on Carriers (3d Ed.) §§ 1197, 1198; 6 Cyc. 623, 653.

If a railroad sees fit to earn a revenue by offering to the public hazardous accommodations on the platform, why should it

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not assume liability for the dangers incident to its own act in so doing? In justice and reason it must do so, unless it shows that it provided the best accommodations that it could under all the circumstances attending the running of its train and then exercised the degree of care that it owed to those it undertook to carry in those accommodations. This is neither a strict nor an unjust rule. If the carrier is taken unawares by unusual and unexpected demand for passage and has not safe accommodations to offer, it may justly and without liability decline to take on board more than the room within its cars will admit. The conductor in charge of the train may refuse to receive passengers that by reason of unavoidable circumstances cannot be given safe places of carriage. To do this is surely within the line of his authority. He is in charge of the train and must necessarily represent the carrier in the transportation of passengers thereon. On the other hand, when he permits passengers to ride on the platform because there is no room for them inside, and recognizes them as passengers and not trespassers by accepting fares for such carriage, or by doing some other act indicative of the fact, he also indeed represents the company. It is within the line of his duty and authority, and he binds the company by the act. Baldwin on American Railroad Law, 311. What weight can be given the notice which is usually posted on the cars that "passengers are not allowed to stand on the platform" if in fact passengers are allowed to stand there for the convenience of the company? Surely none. The company waives this notice and the rule which it recites when, for its own convenience and gain, it receives passengers as such on the platform—uses the platform to earn a revenue. It is nonsensical to give force to such rule when the company does not enforce the same, but violates the rule for its own purposes. Of course the question whether in a particular case the rule is violated for the convenience or gain of the carrier is always an important question to be considered and determined.

A railroad company knows the usual amount of travel on any one of its trains. The sale of tickets and the reports by the conductor or train auditor give it accurate basis of information upon which it can furnish cars to meet all usual demands for passage. And when it is advised of an occasion that will make demand upon any of its trains for more than the usual accommodations, it owes a duty to the public to take reasonable precaution to furnish the same. Particularly is this so when excursion occasions are advertised by the railroad company and excursion tickets sold. If it is made to appear that an overcrowding of cars was so great that passengers were compelled to ride on the platforms, that the lack of sufficient room was due to the negligence of the company itself, that the passengers were accepted for carriage on the platforms, and that such conditions and acts

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caused injury to a passenger, why should not the company be liable in the premises? Railroad companies seek and demand much from the public. They are entitled to the good will and fair consideration which the people through right views and just laws should always give them. They are the great commercial arteries which indeed feed our prosperity and give life and vitality to our riches and comfort. But they owe a reciprocal relation to the public. They are in duty bound to render good and reasonable service and at all times to refrain from neglect, carelessness and imposition in their operations. They peculiarly owe a duty to provide safe and sanitary accommodations for passengers—to refrain from imposing conditions that cause the inconvenient and dangerous overcrowding of trains and the unhealthy and barbarous use of filthy stations.

Since it depends upon the circumstances of each particular case whether the act of a passenger in using the platform as a place of carriage is negligence on his part, the question is usually one for jury determination. 6 Cyc. 654. It is always a question for the jury, and is not determinable by the court as a matter of law, when circumstances reasonably excusing the passenger for riding there are not admittedly shown. If the alleged necessity for riding on the platform is based on an overcrowding of the train and evidence supporting the fact of overcrowding is introduced which is met with other evidence tending to disprove the fact, a conflict is presented which it is the province of the jury to settle. Again, if there are conflicting facts and circumstances in relation to the excuse of the carrier for its alleged failure to provide ample places of safe carriage, or in relation to the degree of care which is used for the transportation of one necessarily on the platform, the jury should pass upon them. It is the province of the jury to pass upon conflicting oral testimony of witnesses which is given in their presence, and that province should not be invaded. But when the evidence, though orally given in the presence of the jury, and though conflicting as a whole, embraces uncontradicted facts or circumstances which cause the case admittedly to turn in favor of one of the parties so that a verdict against him would be set aside, the court may properly direct a verdict in his favor. The court cannot properly direct a verdict, however, in a case turning on a conflict of evidence which makes the material facts so doubtful that a verdict in favor of either party would be sustained. *Ketterman v. Railroad Co.*, 48 W. Va. 606, 37 S. E. 683; *White v. Brewing Co.*, 51 W. Va. 259, 41 S. E. 180; *Coalmer v. Barrett*, 61 W. Va. 237, 56 S. E. 385, and other cases.

Now, in the case before us, the first pertinent inquiry in relation to the alleged negligence of the railroad company is whether a safe place of carriage was provided for plaintiff. Was plaintiff, as he claims, compelled by insufficient passenger ac-

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accommodations to ride on the platform? Or, did he voluntarily and unnecessarily ride there so that his own act in thus doing was the proximate cause of his injury? Then, if the overcrowding was so great that plaintiff was excusable for taking passage on the platform, was that overcrowding the fault of the railroad company in failing to provide ample accommodations? Or, was the overcrowding so unexpected and unusual that provision reasonably could not be made to prevent it? Did the company accept and receive plaintiff as a passenger on the platform of its train for lack of space in the cars? If so, and if it was excusable therein, did it then exercise the degree of care that was due to plaintiff in the hazardous position in which he was permitted to ride? Readily is it to be seen that a charge of negligence involving so many questions of fact must make, in practically every instance, a case for the jury. The determination of any of these questions would usually and naturally turn upon a mass of conflicting facts and circumstances. So it is in this case. A substantial conflict of testimony is involved. No decisive facts are so admittedly shown as to make the general issue determinable as one of law. Many facts and circumstances tend to prove that plaintiff made a reasonable effort to enter the cars, that he was prevented by the overcrowding from doing so, and that he was thus compelled to ride on the platform. Other facts and circumstances tend to prove that there was ample room in the cars and that he took passage on the platform from choice. If this primary issue should be determined in favor of plaintiff, then conflicting facts and circumstances appear which must be settled in order to determine whether the company was negligent by an inexcusable failure to provide ample cars; and, if not so negligent, whether it then failed to take the degree of care that it owed plaintiff because of the unsafe position in which he was obliged, through unforeseen and unavoidable circumstances, to ride. It is not our purpose to multiply words by a recital of the particular facts pertaining to this case. It suffices to say that witnesses as to controlling facts and circumstances on the proposition of negligence are in direct contradiction.

To support its plea of accord and satisfaction the defendant railroad company introduced a receipt for seventy-five dollars, signed by the plaintiff, which recites in substance that the sum is paid by the company and accepted by plaintiff in full payment of any liability for his injury. Plaintiff admitted that the signature thereto is his own. He, however, introduced evidence tending to prove that he was deceptively induced to sign the receipt by representatives of the company at a time when he was in the hospital suffering from the injury, lying on his back, with his senses deadened by pain and narcotic medicines; that he was made to understand and believe that the company was gratuitously giving him the amount for the purpose of paying the hos-

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pital charges and for none other; that the paper which he was asked to sign was falsely represented to him as a check for that purpose; and that the paper was so folded when presented to his reclining position for signature that he was deceived, excusably on his part, as to its real character and purport. The evidence of his witnesses in this behalf is flatly contradicted by the company's physician, in whose hospital he was, and who was present at the time the receipt was obtained. Thus we have a conflict of testimony in this branch of the case also. If the paper was obtained by deception and fraud it cannot sustain the plea of accord and satisfaction. If the receipt was fraudulently obtained it is no bar to this action. 24 Am. & Eng. Enc. of Law. 308, 309. While it is admitted that plaintiff did not read the paper before signing it, yet there is evidence tending to prove that he used as much prudence and circumspection as a man ordinarily would under the circumstances stated as existing at the time. Whether he did exercise such prudence and circumspection, whether he was incapacitated so that he was thrown off his guard, were questions to be determined by the jury. The disputed questions of fact relating to the validity and binding force of the terms of the paper claimed to be a release should have been submitted to the jury under proper instructions by the court as to the law in the premises.

The case was improperly taken from the consideration of the jury. It involved in its material points such disputed questions of fact that a case was not presented for the court's action in directing a verdict. Jury trial in cases to which it rightly belongs is sacredly guaranteed to all. This fundamental right must not be curtailed. The judgment will be reversed, the verdict set aside, and a new trial granted.

STATE *v.* UNION PAC. R. CO.

(Supreme Court of Nebraska, May 23, 1910.)

[126 N. W. Rep. 859.]

Statutes—Construction—Pari Materia.—The acts of the Legislature popularly known as the “railway commission act” (chapter 90, p. 311, Laws 1907), the “anti-pass act” (chapter 93, p. 342, Laws 1907), and the “two-cent fare act” (chapter 92, p. 341, Laws 1907), follow the mandate to the Legislature contained in section 7, art. 11, of the Constitution, are in *pari materia*, and must be construed together.

Carriers—Exchange of Transportation for Services.—Under the law in this state, a railroad company or other common carrier may not exchange transportation for services or property by way of barter; uniformity of charge being required.

Carriers—Fares—Uniformity.—To prove uniformity there must be a standard measurement. The only standard measure possible in order to insure absolute uniformity in the charge is money.

Carriers—Rates—Uniformity—Exchange of Transportation for Advertising.—A contract, which provides for transportation to be issued in exchange for newspaper advertising or for services the value of which is indeterminate, and which permits the amount to be paid for such service to be fixed by agreement of the parties, leaves the rate charged for the transportation a variable quantity.

Carriers—Rates—Uniformity—Exchange of Transportation for Advertising.—A contract by a railroad company to furnish to the proprietors of a newspaper, as requested, transportation at the statutory rate (under certain limitations and restrictions not required in ordinary tickets) in payment for advertising to be furnished “at agreed rates,” which agreed rates are not specified in the contract, but which are to be settled by the parties themselves by another agreement, is in violation of section 14 of the “railway commission act” (Laws 1907, c. 90), section 10,662, Ann. St. 1909, which prohibits common carriers from charging one person a greater or less compensation than another, and which prohibits charging “other than the rates fixed and established.”

Carriers—Rates—Uniformity—Exchange of Transportation for Advertising.—If the proprietor of one newspaper may be selected by the defendant to receive transportation in return for such services, while the proprietor of another cannot avail himself, at his own option, of the privileges of such a contract, then equality and uniformity of charge do not exist.

Carriers—Rates—Uniformity—Exchange of Transportation for Advertising.—Such a contract contravenes the intent and purpose of the statutes, which prohibit unjust discriminations, and which seek to preserve to every individual an equal right to the transportation service of every common carrier within the state upon equal terms with every other individual.

(Syllabus by the Court.)

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Action by the State against the Union Pacific Railroad Company to enjoin certain contracts. Permanent injunction allowed. See, also, 84 Neb. 287, 121 N. W. 1134.

W. T. Thompson and *W. B. Rose*, for the State.

Nelson H. Loomis and *Edson Rich*, for defendant.

LETTON, J. This is an original action in this court brought by the Attorney General, in the name of the state, and by the authority of the Nebraska State Railway Commission, to enjoin the defendant railway company and its officers, agents, and servants from carrying out certain contracts made with the owners of certain newspapers in the state of Nebraska, providing for the issuance of railroad tickets and the furnishing of transportation to certain classes of persons named in the contract, for advertising to be furnished the railway company in the newspapers belonging to the other contracting parties. A temporary restraining order was prayed for and granted at the time of the filing of the petition. It is shown by the evidence that the command of the restraining order was obeyed, and that since its issuance no other contracts of the kind have been entered into, the contracts in existence have been abrogated, and the transportation issued recalled. The defendant railroad company, however, still insists that the execution of such contracts and the furnishing of transportation in accordance therewith is not a violation of law, and, while obeying the restraining order, insists upon its right to have this question determined.

Before considering the legal proposition involved, it will be necessary to summarily state the evidence. A copy of a contract entered into with the owner of the "News Era" of Kearney is set forth in the petition, and it is conceded that contracts entered into with a number of other publishers in the state are substantially the same. The contract referred to is as follows:

"Whereas, W. L. Hand, of Kearney, Neb., is the president of the News-Era Standard, a daily, semiweekly, weekly, monthly newspaper, published at Kearney, in the county of Buffalo, and state of Nebraska, a general weekly newspaper, established 1880, having a circulation of 1,000 copies per issue, desires to enter into a contract with the Union Pacific Railroad Company for advertising in said newspaper as hereinafter provided: Now, therefore, this agreement made and entered into upon the 2d day of January, 1908, by and between the said W. L. Hand, as party of the first, and said Union Pacific Railroad Company, as party of the second part, Witnesseth: That the party of the first part agrees to publish in the issue of said paper, at agreed rates, from January 2, 1908, to December 31, 1908, as follows:

"(1) Such display advertisements, or lines of local notices in the regular local news columns of said paper from time to time

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during the life of this contract, as shall be furnished in manuscript or printed copy by the party of the second part.

"(2) It is agreed that in full payment for the said advertising, the said second party shall pay, and the first party shall accept nontransferable advertising transportation over the lines of Union Pacific Railroad Company in the state of Nebraska only, to the value of one hundred (\$100.00), the transportation not to be limited beyond the time the contract expires, and not extended under any circumstances. The Union Pacific Railroad Company reserves to itself the right to limit such transportation to any train or class of trains, and to refuse to honor said transportation upon any special, limited or fast mail train.

"(3) It is understood that no ticket issued under this contract shall under any circumstances be used by the holder for any part of an interstate journey, and if presented for passage in connection with an interstate journey, shall be void and conductor will lift ticket or tickets and collect for full fare.

"(4) It is also further agreed that the transportation above referred to must be requested and used during the calendar year, and that no claim for failure so to do will be considered. The transportation referred to above is to be granted for W. L. Hand, who occupies the position of editor and manager, family of W. L. Hand, * * * John A. Rhone, who occupies the position of secretary and foreman, family of A. Rhone, * * * on the newspaper above mentioned, or in the name of the wife, son or daughter of the proprietor, business manager or editor of the paper above mentioned.

"(5) It is understood and agreed that, should said transportation be sold loaned or traded off, or presented for passage by any person other than the one whose name is written thereon, it shall then be taken up by the conductor and not again made good by the party of the second part to the said first party. The misuse of transportation may be considered as sufficient cause for the cancellation of this contract.

"(6) It is also understood and agreed that no additional transportation is to be granted on account of said advertisement, and that the conditions specified on each ticket are hereby made a part of this contract.

"(7) The party of the second part will not pay for the publication of its time-tables unless such publication be specially authorized in writing by the general passenger agent of Union Pacific Railroad Company.

"(8) The party of the second part reserves the right to revoke this contract at will, discontinue the advertisement, and call in the transportation issued.

"(9) If the ownership of said publication be transferred, it is agreed that the assumption of this contract is to be made a part of the consideration of said transfer. Otherwise this con-

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tract shall thereby be canceled and all transportation thereunder shall thereby become void.

"(10) Should the person or persons to whom transportation is issued on account of this contract sever his or her connection with said paper from any cause whatever, then the transportation held by such person or persons shall be surrendered to the party of the second part at once and no transportation issued for any other person or persons on account of said paper until after the said transportation has been returned. It is also agreed that a copy of each issue of said paper shall be mailed free to agent of said company at Kearney, Neb. and Chas. Ware, superintendent at Omaha, Neb., and also one to E. L. Lomax, general passenger agent at Omaha, Neb. All requests for transportation must be made through the agent above.

"(11) This contract expires December 31, 1908.

"In witness whereof, the said first party has hereunto set his hand and seal, and the said party of the second part has caused this contract to be executed by its general passenger agent upon the second day of January 1908.

"[Signed]

"New Era Pub. Co., [Seal.]

"By W. L. Hand, Pres.

"[Proprietor,

"[Business Manager,

"[Editor.]

"Union Pacific Railroad Co.,

"By [Signed] E. L. Lomax,

"General Passenger Agent.

"Darlow."

The testimony of the employee in charge of the advertising department of the defendant in regard to the customary dealings with newspaper owners under the contract is to the effect that the advertisements placed in all such newspapers are to be charged at the regular rate charged by the newspaper in each case to the public generally for the same service, which would vary in different localities; that a statement or bill would be rendered by the publisher for the advertising done; that the transportation issued did not exceed the value of the advertising when the transportation was measured at the rate of two cents per mile; that it was not issued when the advertising was placed, but after the advertising had been run, and the statement of the amount due followed; that the transportation issued did not exceed the amount of the bills rendered; and that special forms of trip, 500-mile, and 1,000-mile tickets, were issued under these contracts. It is also shown that the railroad company had no permission or authority from the railway commission to enter into the contracts, either before or after the execution.

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The Attorney General contends that the contracts and the tickets issued in conformity therewith constitute a violation of the acts popularly known as the "railway commission act" (chapter 90, p. 311, Laws 1907; sections 10,649—10,663, inc., Ann. St. 1909), the "anti-pass act" (chapter 93, p. 342, Laws 1907; sections, 10,664—10,665, Ann. St. 1909), and the "two-cent fare law" (chapter 92, p. 341, Laws 1907; sections 10,618—10,623, inc., Ann. St. 1909), and that the transportation issued under the contract constituted a "special rate" an "unjust discrimination," and an "unreasonable preference," as defined by said acts. He takes the broad ground that transportation furnished by a railroad company for any consideration other than a money consideration, to an adult, and at a rate other than two cents per mile, constitutes an unjust discrimination prohibited by law.

The defendant contends that, under the contract, the railroad company paid for the advertising furnished at the regular published and current rates by credits upon its books for the amount furnished; that the transportation was paid for at the full legal rate of two cents per mile by such credits; that the Nebraska law is designedly different from the interstate commerce acts, in that it does not prohibit "different" compensation for transportation, and does not limit payment to cash only; that if the act had regulated the medium of payment it would have been unconstitutional; that there was no attempt to discriminate, or to violate the two-cent fare law; and that what was done had no such effect.

The sections of the statutes controlling the case are as follows: "It shall be unlawful for any railroad corporation operating, or which shall hereafter operate, a railroad in this state to charge, collect, demand, or receive for the transportation of any passenger over twelve years of age, with baggage, not exceeding two hundred pounds in weight, on any train over its line of road in the state of Nebraska, a sum exceeding two cents per mile, provided, that no railroad company shall be required to sell any ticket for less than five cents." Section 10,618, Ann. St. 1909. Section 10,662, Ann. St. 1909, so far as applicable, is as follows: "If any railway company or common carrier subject to the provisions of this act, directly or indirectly, through or by its agents, officers or employees, by any special rate, rebate, drawback, or other device, shall charge, demand, collect or receive from any person, firm or corporation, a greater or less compensation for any service rendered, or to be rendered by it than it charges, demands, collects, or receives from any other person, firm, or corporation for doing a like and contemporaneous service, the same shall constitute an unjust discrimination, which is hereby forbidden and declared to be unlawful. (a) If any railway company or common carrier subject to the provisions of this act, through or by its officers, agents, or em-

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ployees, makes or gives any undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality, * * * the same shall constitute an unjust discrimination, which is hereby prohibited. * * * (f) Any officer, agent or employee of any railway company or common carrier subject to the provisions of this act, who, by means of false billing, false classification, false weight, or by any other device, shall suffer or permit any person or persons to obtain transportation for property at less than the regular rates then in force on said line of said railway company or common carrier, or any part thereof, or who, by means of false billing, false classification, false weighing, or by any device whatsoever, shall charge any person, firm, or corporation for the transportation of property other than the rates fixed and established, upon the line of said railway company or common carrier, shall be guilty of a misdemeanor." Section 10,664, prohibiting free transportation, should also be considered as bearing upon legislative policy in this regard. These provisions of the statutes, though forming parts of separate acts, enacted at different times, treat of the same subject-matter. They form stages in the progressive development of legislation seeking to correct abuses which formerly existed. They carry out specifically the mandate to the Legislature given by section 7, art. 11, of the Constitution that "the Legislature shall pass laws to correct abuses, and prevent unjust discrimination and extortion in all charges of express, telegraph, and railroad companies in this state, and enforce such laws by adequate penalties to the extent, if necessary for that purpose, of forfeiture of their property and franchises." They are, therefore, in *pari materia*, and must be construed together. *State v. Omaha Elevator Co.*, 75 Neb. 637, 106 N. W. 979, 110 N. W. 874; *State v. Martyn*, 82 Neb. 225, 117 N. W. 719, 23 L. R. A. (N. S.) 217.

The statute provides that the carrier shall not collect or receive "a greater or less compensation" from one person than from another. The railway commission act commanded all railway companies in Nebraska to file with the railway commission scheduled rates and charges in effect on their lines in the state of Nebraska on January 1, 1907, which rates should be the rates and charges in force and effect unless changed by the railway commission in conformity with procedure provided for in the act. The rate of charge for passenger transportation was also fixed by statute. These rates and charges are expressed and measured by dollars and cents. If a railway company can adopt the principle of barter and receive in return for its service specific articles the value of which may vary from day to day, and often may be uncertain, the magnitude of the task of ascertainment of the value of each article alone would render the regulation of rates, so as to prevent discrimination, absolutely im-

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possible. To procure uniformity there must be a standard measurement. The only measure possible in order to insure absolute uniformity in the charge is the standard medium of exchange and measure of value—money. But, it is contended, although the rate charged for advertising varies in different localities, yet the amount charged in each instance is the regular current rate charged to the public generally in that locality, and that, since the railway company would be required to pay this rate in money for the advertising furnished, it is not discrimination to pay for it in transportation at the statutory rate.

This argument loses sight of two considerations: First, that no price or rate of charges for the advertising is fixed in the contract. The publication is to be "at agreed rates," leaving the parties free to fix for themselves by agreement the value of the service rendered and the price to be paid. It is true that the witness testifies that the agreement has always been the same as the current rate for advertising in the locality; but there is nothing in the contract which requires the price agreed upon to be the current rate to the public generally. A contract which permits transportation to be issued in exchange for a product or for services, the value of which is indeterminate, and which leaves the charge to be fixed by agreement of the parties, plainly leaves the price of the transportation a variable quantity. The price of the ticket would vary exactly as the price of the advertising varied. If the parties agree upon a high rate of advertising, they agree to a low rate for transportation, and vice versa. It could never have been the intention of the Legislature to permit such an opportunity to evade the terms of the law. Giving the defendant credit for acting in good faith, as its witness testifies, in making the contracts complained of, and in making agreements thereafter to pay for advertising at current prices, still to uphold such contracts would open a door which in the hands of designing persons might operate to nullify the most essential and beneficial provisions of this legislation. *Union Pacific R. Co. v. Goodridge*, 149 U. S. 680, 13 Sup. Ct. 970, 37 L. Ed. 896; *United States v. Atchison, T. & S. F. R. Co.* (D. C.) 163 Fed. 111.

Futhermore, there is no proof that any persons or corporations, other than the favored persons with whom the railroad company is willing to enter into such contracts, may avail themselves of the privilege of paying for transportation for themselves or for their employees or members of their respective families by the use of their advertising pages. If the proprietor of one newspaper may be selected by the defendant to receive transportation in return for such services, while the proprietor of another cannot avail himself, at his own option, of the privileges of such a contract, then certainly equality and uniformity

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of charge, which is required by both common law and statute, do not exist (*McDuffee v. Railroad*, 52 N. H. 430, 13 Am Rep. 72; *Sandford v. Railroad Company*, 24 Pa. 378, 64 Am. Dec. 667), while if money were the only consideration, and the same rate were charged, each would stand exactly upon the same footing.

The defendant insists that the only advantage that it derives from these contracts is that it thereby sells transportation to persons who otherwise might not purchase it; but, if persons belonging to a certain class are induced to purchase transportation in excess of that which they would buy for cash, it is plain that the inducement must be sufficiently strong to cause them to believe that they are receiving transportation for a less amount than if they paid for it in money, or that they are receiving advertising patronage not otherwise to be had. There evidently must be some advantage accruing to the contracting parties, or each of them must think so, else they would not enter into the contract.

If the contract newspaper owner is of the opinion that, under the contract, in return for advertising at current prices to the public generally, he is receiving transportation upon the same basis and under no other or greater limitations than the public generally, he is in error. In addition to the limitations expressed in the contract itself that the transportation shall not be limited beyond the time the contract expires, and not extended under any circumstances; that it cannot be used for any part of an interstate journey, and if presented for passage in connection with an interstate journey shall be void; that if the ownership of the publication is transferred, unless the contract is assumed, all transportation thereunder shall thereby become void—it is provided in the 500 and 1,000 mile ticket issued thereunder that in case the holder severs his connection with the publication on account of which the ticket is issued, or in case the advertising contract under which it is issued shall be canceled, all further rights under the contract to the use or possession of the ticket are surrendered, and the same may be taken up wherever found.

A somewhat similar contract, made with reference to *Munsey's Magazine*, was under consideration in the case of *United States v. Chicago, I & L. R. Co.* (C. C.) 163 Fed. 114, although the contract in that case was less objectionable than that under consideration, being specific with regard to the cost of the advertising. It specified the amount of advertising space to be furnished in exchange for tickets to the value of \$500, while this contract leaves the whole matter of price open to future agreement. The court say: "Indeed, if it is taken at its cash value, why should the transportation be limited as specified in the contract? If the magazine is paying \$500 to the defendant, why does it accept transportation both of less and different value

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than it would accept if it bought its tickets with money? Why embarrass itself with menacing pains and penalties for failure to observe all the conditions of the special contract, when by the use of cash it may travel and give no concern to technical limitations? It seems fair to conclude that either the advertising is of less than cash value, or the advertisers are grossly imposed upon by the railroad." The court further points out that in that contract, as in this, there is no provision requiring that the advertising must have been furnished before the transportation is given, and shows that the publisher could under the contract demand the tickets at once if he chose and at the beginning of the term, and therefore in the mere matter of interest the rate would be less and different from that which is published.

The principal point urged in the oral argument by counsel for defendant was that, since the statute does not prohibit receiving a "different" compensation, the contract is not in violation of the statute. Counsel urges that the case of *United States v. Chicago, I. & L. R. Co.*, *supra*, is based upon the peculiar language of the Hepburn act (Act June 29, 1906, c. 3591, 34 Stat. 584 [U. S. Comp. St. Supp. 1909, p. 1149]), whereby the word "different" was added to the words "greater or less compensation" in the Elkins act (Act Feb. 19, 1903, c. 708, 32 Stat. 847 [U. S. Comp. St. Supp. 1909, p. 1138]), but we do not so understand the decision in this case. While the writer of the opinion discusses the change in the statute, and holds that the facts bring the case within the terms of the Hepburn act, he does not say that the contract does not violate the Elkins act. But, regardless of what the decisions of the federal courts have been upon the Elkins act, under the provisions of section 10,662 of the Nebraska statute, it is an infraction of law "by any decree whatsoever" to "charge any person, firm, or corporation for the transportation of property, other than the rates fixed and established." The difference between the meaning of a statute which prohibits a "different" compensation and one which prohibits a charge "other than the fixed and established rates" is to the writer imperceptible, and the reasoning applicable to one statute seems to apply with equal force to the provisions of the other. Moreover, in *Armour Packing Co. v. United States*, 209 U. S. 56, 72, 28 Sup. Ct. 428, 432 (52 L. Ed. 681), the Elkins act is construed, and it is said: "The Elkins act proceeded upon broad lines, and was evidently intended to effectuate the purpose of Congress to require that all shippers should be treated alike, and that the only rate charged to any shipper for the same service, under the same conditions should be the one established, published, and posted as required by law." We think the purpose of the acts identical, and construe the Nebraska statute to have the same intent, and to make the same requirements in this behalf.

To sum up, when it is considered that, although the transporta-

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tion is said to be sold at the rate of two cents per mile, it is, in fact, hedged about by many restrictions and limitations not contained in the tickets offered for sale for the general public for the same price in cash; considering, also, that the privileges, if any, and whatever they may be, under the contract, are not open upon the same terms to all persons engaged in the publication of newspapers within the state; considering, also, the fact that the amount to be paid for the advertising, and, therefore, necessarily the amount to be paid for transportation under the terms of the contract, may be fixed at whatever rate the parties subsequently agree upon—it seems obvious that the contract runs counter to the intent and purpose of the Constitution and statutes quoted. These seek to prohibit unjust discriminations, either direct or indirect; they are designed to take away from a public carrier the power of arbitrary selection of persons or corporations as the objects of its favor or disfavor; they seek to preserve to every individual an equal right to the transportation service of every common carrier within the state upon equal terms with every other individual. As was said of the interstate commerce act of 1903 by Mr. Justice White (*New York, New Haven & H. R. Co. v. Interstate Commerce Com.*, 200 U. S. 361, 391, 26 Sup. Ct. 272, 277 [50 L. Ed. 515]): "It cannot be challenged that the great purpose of the act to regulate commerce, whilst seeking to prevent unjust and unreasonable rates, was to secure equality of rates as to all and to destroy favoritism; these last being accomplished by requiring the publication of tariffs and by prohibiting secret departures from such tariffs, and forbidding rebates, preferences, and all other forms of undue discrimination. To this extent and for these purposes the statute was remedial and is, therefore, entitled to receive that interpretation which reasonably accomplishes the great public purpose which it was enacted to subserve."

We are convinced that (to paraphrase the language of Mr. Justice Day in *American Express Co. v. United States*, 212 U. S. 522, 29 Sup. Ct. 315, 53 L. Ed. 635, decided February 23, 1909): "In the absence of express exceptions, we think it was the intention of Congress (the Legislature) to prevent a departure from the published rates and schedules in any manner whatsoever. If this be not so, a wide door is opened to favoritism in the carriage of property." The fundamental principles covering the duties of common carriers to the public in respect to equal privileges have been clearly elucidated in the following cases, and are so well settled as to make quotation needless; but the opinions are worthy of careful consideration: *Messenger v. Pennsylvania R. Co.*, 36 N. J. Law 407, 13 Am. Rep. 457; *McNeill v. Railroad Co.*, 132 N. C. 510, 44 S. E. 34, 67 L. R. A. 227, 95 Am. St. Rep. 641; *N. Y., N. H. & R. Co. v. Interstate*

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Commerce Comm., *supra*; and United States v. Wells Fargo Express (C. C.) 161 Fed. 606.

Even though, as it pleads, the defendant may have entered into these contract with no intention of violating the law, and has obeyed the restraining order of the court, yet the practice was pernicious and was an unlawful discrimination under the statute.

The prayer of the petition for a permanent injunction against defendants must be allowed.

ROSE, J., not sitting.

HARVEY v. ATLANTIC COAST LINE R. CO.

(Supreme Court of North Carolina, Dec. 7, 1910.)

[69 S. E. Rep. 627.]

Carriers — Passengers — Contract of Carriage — Mileage Book.—A mileage book, issued by a railroad company, was labeled a mileage "ticket," and stipulated that "this ticket will be honored," etc., and that "this ticket expires," etc., and provided that undetached coupons would be honored on trains for transportation of passenger and baggage from nonagency stations or from an agency station not open for the sale of tickets, but, where offices were open for the sale of tickets, the holder was required to present the mileage book and procure an "exchange mileage ticket." Held that, where the holder of such book was prevented from exchanging coupons for mileage tickets, as by the company's failure to afford him reasonable facilities for making the exchange, the book became a complete contract of carriage, entitling him to carriage without exchanging the coupons for the tickets.

Appeal and Error—Review—Verdict — Conclusiveness — Excessive Damages.—Under Const. art. 4, § 8, giving the Supreme Court jurisdiction to review upon appeal any decision of the court below upon any matter of law or legal inference, the Supreme Court cannot direct that a verdict be set aside and a new trial granted because of excessive damages awarded, unless the verdict is so clearly excessive as to make it clear that the jury wholly disregarded the testimony, so as to make the trial judge's failure to set aside the verdict a gross abuse of his discretion, which would amount to the denial of a legal right, so as to authorize the Supreme Court to review his ruling.

Appeal and Error—Review—Questions of Fact—Constitutional Provisions.—Const. art. 4, § 8, as amended, giving the Supreme Court jurisdiction over issues of fact and questions of fact to the same extent as exercised by it prior to the Constitution of 1868, does not apply to common-law actions but only to suits which were exclu-

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sively cognizable in equity, and in which the entire proof is written or documentary.

New Trial—Grounds—Verdict against Evidence.—When it clearly appears that a verdict was rendered under the influence of passion or prejudice in disregard of the testimony, the trial judge should promptly set it aside.

Appeal and Error—Review—Discretion of Trial Court—Excessive Damages.—Plaintiff was not given opportunity to exchange his railroad mileage book coupons for mileage tickets at the ticket office as the mileage book required, and when he presented the coupon, was, without rudeness or unnecessary force, ejected from the train because he had not exchanged it for and presented a mileage ticket, though he offered to pay his fare. The trial court reduced a verdict for plaintiff from \$5,000 to \$2,500. Held, that there was no such abuse of discretion by the trial court as to authorize a review of his ruling on the ground that the damages were excessive.

Damages—Mitigation—Duty to Mitigate.—The rule that one injured by another's wrongful conduct must do whatever he reasonably can to avoid or lessen the effects of the wrong, does not apply until after the wrong has been committed or the contract has been broken, as the person injured need not anticipate that the wrongdoer will continue his conduct until an actionable wrong has been committed, so that one entitled to ride on mileage book coupons was not bound to tender his fare in money, to prevent his ejection, in order to recover substantial damages therefor.

Brown and Walker, JJ., dissenting in part.

Appeal from Superior Court, Wayne County; W. R. Allen, Judge.

Action by Thomas Harvey against the Atlantic Coast Line Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

The facts in evidence are set out in the case on appeal as follows: "There was evidence tending to show that plaintiff was a commercial traveler, and desired to take passage from Wilson to Goldsboro, N. C., over the defendant's road, and he had in his possession a mileage book, good over the defendant's road, with sufficient mileage therein unused to carry him from Wilson to Goldsboro. There was evidence which tended to prove that plaintiff went into defendant's ticket office in Wilson; that there was a great crowd purchasing tickets; that plaintiff got in line in the proper place, and waited his turn until he at least reached the ticket window and presented his mileage and demanded a ticket, which the agent refused to give him, telling him to wait until he got through with the others; that the plaintiff stood in his position and saw the agent wait on several others, and again handed in his mileage book and demanded a

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ticket, and was again refused; that he did this two or three times; that he stayed in his position at the ticket window until about time for the arrival of his train, when he had to leave for the purpose of getting his baggage checked; that the baggage agent checked his baggage on his mileage, and after getting the same checked he barely had time to catch his train, and did not have time to return to the ticket office and again seek to get his ticket; that the plaintiff entered the train, and, when the conductor called for his ticket, made a statement of the foregoing facts to the conductor, and the defendant's conductor, without any rudeness and without any unnecessary force, when the train stopped at Black Creek, put the plaintiff off and refused to him the privilege of getting back on the train, although he then offered to pay his fare. There was evidence also tending to show that the crowd in the station on the day in question was unusually large; that a religious convention had been in session in Wilson for several days, and had adjourned on this occasion, and that the defendant's agents knew in advance when it would adjourn, and that there would be a large crowd. There was evidence tending to show that the agent of the company knew that he could hold the train on which plaintiff wanted to go as long as 30 minutes for the purpose of furnishing all passengers with tickets, but there was no evidence that the plaintiff knew this, or that the agent communicated this fact to him. Plaintiff had purchased from the proper person and was the owner of a mileage book, good for his passage over the defendant's road, and had enough mileage in it to more than cover the distance to Goldsboro. Defendant relied upon the conditions printed on the back of said mileage book, as follows:

"Item 6. Coupons from this book will not be honored on train or steamer, nor in checking baggage (except from non-agency stations and agency stations not open for sale of tickets), but must be presented at ticket office and there exchanged for continuous passage tickets, which continuous passage tickets will be honored in checking baggage, and for passage, when presented in connection with this mileage book. This book is subject to the exceptions, rules and regulations of each line over which it reads, with which exceptions, rules and regulations purchaser herein must acquaint himself."

"Item 7. No agent or employee of any line has power to alter, modify or waive any conditions of this contract or any stipulation printed hereon."

"Item 14. The cover of this book shall be surrendered to conductor or train auditor who detaches last mileage strip or who lifts final coupon issued by agent in exchange for last mileage strip. In consideration of the reduced rate at which this book was sold, I, the original purchaser, hereby accept and agree to be governed by all of the conditions printed on this book and

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on tickets issued in exchange for coupons from this book, and acknowledge that the description furnished herein correctly indicates my personal appearance according to the terms used.'

"This contract was signed by the plaintiff and the agent of the defendant. The mileage book in question was sold to the plaintiff for \$20, or at the rate of 2 cents a mile. The price for an ordinary ticket over the defendant's road was and is 2½ cents per mile. There was evidence tending to show that the plaintiff had money with him sufficient to enable him to pay his fare to Goldsboro, and that the conductor asked him to do so. The jury rendered the following verdict: 'The jury answered the issues as follows: (1) Did the defendant wrongfully eject the plaintiff from its train? A. Yes. (2) If so, what damage, if any, has the plaintiff sustained thereby? A. \$5,000.' The defendant moves to set aside the verdict as being excessive. The judge, in the exercise of his discretion, refused to set aside the verdict. With the consent of the plaintiff, the judge reduced the verdict to \$2,500 and rendered judgment accordingly, from which ruling and judgment the defendant appealed to the superior court. The defendant allowed 30 days in which to make out a case on appeal, and the plaintiff allowed 30 days thereafter to file counterclaim. Appeal bond fixed at \$25."

W. C. Munroe and Rose & Rose, for appellant.

Aycock & Winston, W. T. Dortch, and Loftin, Varser & Dawson, for appellee.

HOKE, J. It was earnestly insisted before us that no recovery should have been allowed in this case, and this chiefly for the reason that on the facts in evidence the mileage book was not a contract of carriage, but only a binding agreement to supply a ticket, and the plaintiff having failed to procure the ticket and refused to pay the fare that the conductor had a right to expel him from the train, but we do not think such a position can be maintained. The book purports throughout to be a contract of carriage. It is labeled a mileage ticket, and begins with a stipulation that this "ticket will be honored," etc., and on the time limit that "this ticket expires," and so on, and containing an express provision that "undetached coupons will be honored on trains for transportation of passenger and baggage from a non-agency station or from an agency station that is not open for the sale of tickets," etc. A perusal of this mileage book and its various provisions leads necessarily to the conclusion that it is a contract of carriage with the purchaser and holder, subject to certain restrictive stipulations for a wrongful breach of which defendant company may under given conditions expel such holder from its trains, but while the contract requires that at agency stations the holder shall ordinarily present his mileage book at the office, and procure an "exchange mileage ticket," it clearly

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contemplates that the company on its part shall afford reasonable and proper facilities for such exchange. This is not only apparent from the general purport of the contract, but it is included, we think, within the express provision that "coupons undetached will be received for passage from nonagency stations and agency stations not open for sale of tickets." And from this it follows that, where by the wrong and fault of the company, a lawful holder of a mileage book is prevented from making the exchange required, such holder is relieved of the conditions, and his book becomes a complete contract of carriage, unaffected by the restrictions referred to. There are several well-considered cases holding these mileage books to be contracts of carriage, notably, *Pennsylvania Co. v. Lenhart*, 120 Fed. 61, 56 C. C. A. 467; *Pittsburg, C., C. & St. L. Railway Co. v. Street*, 26 Ind. App. 224, 59 N. E. 404. And these and other authorities on contracts of similar import are to the effect that when a carrier has wrongfully failed to afford reasonable and proper facilities for complying with these and similar restrictive stipulations the holder is thereby relieved from this feature of the obligation and his expulsion from the train on the part of the defendant's agents may become an actionable wrong. *Cherry v. Chicago & Alton*, 191 Mo. 489, 90 N. W. 381, 2 L. R. A. (N. S.) 695, 109 Am. St. Rep. 830; *Texas & Pacific Railway v. Payne*, 99 Tex. 46, 87 S. W. 330, 70 L. R. A. 946, 122 Am. St. Rep. 603; *Railway v. Street*, *supra*. In the last case it was held that: "Where plaintiff presented an interchangeable mileage ticket to defendant railroad company's ticket agent, purchased of a passenger association of which defendant was a member, and demanded an exchange ticket, and was informed by the agent that the supply of tickets was exhausted, he was not required to pay the regular fare, and then sue the company for failure to carry him on his mileage book, but had the right to be carried on his mileage, and, if ejected, bring suit for damages. In *Railway v. Payne* the passenger had a return ticket requiring that it be presented and indorsed by the agent at the destination of a shipment which he was accompanying. The agent in question having refused to indorse the ticket, the passenger on the return trip having presented the ticket and refused to pay his fare, was ejected from the train at an intermediate station. It was held the passenger was entitled to recover damages "Not only for the value of the transportation and the expenses occasioned by such ejection; but also for the humiliation, etc., caused thereby."

The principle upon which these cases are made to rest has been upheld in a well-considered decision of our court (*Ammons v. Railway*, 138 N. C. 555, 51 S. E. 127), in which it was held as follows: "(1) A regulation of a carrier is reasonable which requires passengers to procure tickets before entering the

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car, and where this requirement is duly made known, and reasonable opportunities are afforded for complying with it, it may be enforced either by expulsion from the train or by requiring the payment of a higher rate than the ticket fare. (2) If, without having afforded a reasonable opportunity to the passenger to provide himself with a ticket, the carrier should eject him upon his refusal to pay the additional charge for carriage without a ticket, when he is ready and offers to pay his fare at the ticket rate, his expulsion will be illegal, and he may recover damages for the trespass, and his right of recovery cannot be made to depend upon the conductor's knowledge or ignorance of the fact that the agent had no tickets for sale." Associate Justice Walker, delivering the opinion, quotes with approval from Fetter on Carriers, § 269, as follows: "By the overwhelming weight of authority, the furnishing of proper facilities to enable a passenger to purchase a ticket is a prerequisite to the right to demand a train fare at a higher rate than the ticket fare; and, if such facilities are not furnished, a passenger who without fault on his part boards a train without such a ticket, will, on tender of the ticket fare, be entitled to all the rights and privileges that a ticket would afford him. If he is rightfully on the train without a ticket, it is his right to complete his journey by paying the ticket rate for his fare. So, it has been held that the fact that the company agrees to refund the excess of train fare on presentation of the conductor's receipt or check at a regular station does not authorize the higher train charge, if no reasonable opportunity is given the passenger to purchase a ticket in the first instance. It cannot be justly said that it is reasonable to require the passenger to pay more than a regular rate on the train, even though a process is created by which he may at some future time get back the excess, unless the passenger has first had an opportunity to purchase a ticket at the station from which he starts." And the same general principle was recognized and applied to a different state of facts in the recent case of *Mace v. Southern Ry.*, 151 N. C. 404, 66 S. E. 342, 24 L. R. A. (N. S.) 1178. We were urged on the argument to direct that the verdict be set aside and a new trial granted by reason of an excessive award of damages on the part of the jury, but such a ruling may not be made here; certainly not in the form as suggested. Under our Constitution, art. 4, § 8, this court is given "jurisdiction to review upon appeal any decision of the court below upon any matter of law or legal inference," and so far as relevant to the question presented this is the extent of it, and we have no power to act directly on the verdict of juries. Ever since the amendment to the Constitution conferring jurisdiction over "issues of fact and questions of fact to the same extent as exercised prior to the Constitution of 1868," the construction

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Of the amendment, in several well-considered cases, has been that it does not embrace or apply to common-law actions such as this, but only to suits which were exclusively cognizable in a court of equity, and to them only when the entire proof is written or documentary, and in all respects the same as it was when the court below passed upon it. *Runnion v. Ramsey*, 93 N. C. 411; *Worthy v. Shields*, 90 N. C. 192; *State ex rel. City of Greensboro v. Scott*, 84 N. C. 184; *Foushee v. Thompson & Pattershall*, 67 N. C. 453. Under our system of procedure, the power we are now invited to exercise is primarily vested in our superior court judges, who preside at the trial of causes. Being in a position to note the appearance and conduct of parties, the demeanor of witnesses and the existence of conditions bearing upon the trial, they are much better qualified to supervise the conduct of juries and deal with their verdicts than an appellate court can possibly be. Undoubtedly, when it is clear that a jury, in disregard of the testimony, has rendered a verdict under the influence of passion or prejudice, a presiding judge should be prompt to set the same aside, but the matter is necessarily left largely to his discretion, and to such an extent that in many of our cases expressions will be found to the effect that this discretion is final, and so it is in so far as the direct supervision of verdicts is concerned. *Boney v. R. R.*, 145 N. C. 248, 58 S. E. 1082; *Slocumb v. R. R.*, 142 N. C. 349, 55 S. E. 196; *Norton v. R. R.*, 122 N. C. 937, 29 S. E. 886. Our Supreme Court can only influence verdicts indirectly by considering, in the exercise of its appellate power, the action of the presiding judge, in reference to them. If verdicts are so clearly contrary to the evidence as to make it perfectly clear, as stated, that a jury must have acted in total disregard of the testimony and to such an extent that the presiding judge had manifestly committed a gross abuse of his discretion, in failing to set it aside, this would amount to the denial of a legal right and bring the case within the appellate jurisdiction of this court. The correct position is well stated by Associate Justice Brown, in a recent case of *Freeman v. Bell*, 150 N. C. 149, 63 S. E. 684, as follows: "It may be, as contended, that the damages awarded are excessive, but we cannot review the judge of the superior court, upon a matter within his sound discretion, unless it appears that there has been a gross abuse of such discretion." And the same position is recognized in another case at the same term of *Billings v. Observer*, 150 N. C. 543, 64 S. E. 435. Applying the principle, as stated, we cannot hold that the action of the lower court in dealing with this verdict is such an abuse of discretion as to raise a question of law or legal inference, and the position must be resolved against the defendant. It was further contended that there was error in allowing substantial damages for the wrong done defendant for

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the reason that plaintiff might have prevented or avoided his chief grievance by paying the small amount of money demanded for his fare, but no such position can be allowed to prevail in this jurisdiction. The court has held, in several recent cases, that when one has been injured by the wrongful conduct of another he must do what can be reasonably done to avoid or lessen the effects of the wrong. This was held in the case of torts in *Bowen v. King*, 146 N. C. 391, 59 S. E. 1044, and *Railway v. Hardware Co.*, 143 N. C. 54, 55 S. E. 422, and recognized in a case of contract in *Tillinghast v. Cotton Mills*, 143 N. C. 268, 55 S. E. 621, but the principle which obtained in those cases does not arise or apply until after a tort has been committed or contract has been broken. A person is not required to anticipate that another will persist in misdoing till an actionable wrong has been committed, nor to shape his course beforehand so as to avoid its result. On the contrary, he may assume to the last that the wrongdoer will turn from his way or in any event he may stand upon his legal rights and hold the other for the legal damages which may ensue. *Cherry v. R. R.*, 191 Mo. 489, 90 S. W. 381, 2 L. R. A. (N. S.) 695, 109 Am. St. Rep. 830; *Pennsylvania Co. v. Lenhart*, 120 Fed. 63, 56 C. C. A. 469. In this last case, speaking to this question, the court said: "Lenhart paid for and presented a legal ticket. To the proposition that he could not stand upon his rights, but was compelled, for the sake of saving the company from the consequences of its threatened breach of contract, to pay his fare again in cash, if he had it, and then sue for its recovery, we do not yield our assent. After a breach of contract has been committed, the injured party is not allowed to aggravate his damages, and is required to use reasonable diligence to minimize them. But, beforehand, one is not forced to abandon his legal right under a contract, and waived, the damages that may arise from its breach, in order to induce his adversary not to proceed as he wrongfully claims is his right." We find no reversible error in the record, and the judgment below must be affirmed.

No error.

J. ALEXANDER CHILES, Plff. in Err., v. CHESAPEAKE & OHIO
RAILWAY COMPANY.

(Argued April 18, 1910. Decided May 31, 1910.)

[30 Sup. Ct. Rep. 667.]

Carriers—Congressional Inaction—Separating White and Negro Passengers.—Congressional inaction is equivalent to a declaration that a carrier may, by its regulations, separate white and negro interstate passengers.

In error to the Court of Appeals of the State of Kentucky to review a judgment which affirmed a judgment of the Circuit Court of Fayette County, in that state, in favor of the carrier in an action by an interstate negro passenger for damages for his eviction from a car set apart exclusively for white persons. Affirmed.

See same case below, 125 Ky. 299, 101 S. W. 386.

The facts are stated in the opinion.

Messrs. *J. Alexander Chiles*, in propria persona, *Albert S. White*, *W. L. Ricks*, and *B. E. Smith* for plaintiff in error.

Messrs. *John T. Shelby*, *Henry T. Wickham*, and *Henry Taylor, Jr.*, for defendant in error.

Mr. Justice McKENNA delivered the opinion of the court:

Plaintiff in error is a colored man. He bought a first-class ticket from defendant in error, a corporation engaged in operating a line of railroad from the city of Louisville, state of Kentucky, and the city of Cincinnati, state of Ohio, to the city of Washington, District of Columbia. The ticket entitled him to ride from Washington to Lexington, Kentucky.

The train which he took at Washington did not run through to Lexington, and he changed to another train at Ashland, Kentucky, going into a car which, it is alleged, under the rules and regulations of defendant in error, was set apart exclusively for white persons. From this car he was required to remove to a car set apart exclusively for the transportation of colored persons.

He removed under protest, and only after a police officer had been summoned by defendant in error. Subsequently he brought this action in the circuit court of Fayette county, Kentucky. The case was tried to a jury, which rendered a verdict against him. A motion for a new trial was overruled. He appealed to the court of appeals of the state, and the action and judgment of the trial court were affirmed.

The assignments of error in this court depend upon the contention that plaintiff in error was an interstate passenger, and was entitled to a first-class passage from Washington to Lexington, and that therefore the act of defendant in error, in causing him

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to be removed from the car at Ashland, was a violation of his rights, and subjected the railroad company to damages.

The court of appeals of the state made the case turn on a narrow ground; to wit, the right which, it was decided, a railroad company had "to establish such rules and regulations as will require white and colored passengers, although they may be interstate, to occupy separate compartments upon the train." The court, however, said that there could be no discrimination in the accommodations.

The court found the facts of the removal of plaintiff, and the character of the car to which he was required to remove, as follows:

"This Lexington train is made up of four coaches: the first, and the one nearest the engine, being a combined baggage, mail, and express car; the second is a passenger coach, divided by board partitions into three compartments; one of these compartments, located in the end of the car, is set apart for colored passengers; the middle compartment is for the use of colored passengers who smoke; and the end compartment is for the accommodation of white persons who smoke; the third car is a passenger coach intended for the use of white ladies and gentlemen; the fourth car is a sleeping car that runs through from Washington to Lexington. Appellant, when he attempted to get on the Lexington train, was told by the brakeman to go in the colored apartment. This he declined to do, and walked in and took a seat in the third coach, set apart for the exclusive use of white passengers. In a few moments the conductor came in and asked the appellant, in obedience to a rule of the company, to go forward in the apartment set apart for colored passengers, but he refused to do so, stating that he had bought a through first-class ticket from Washington to Lexington, and was an interstate passenger who knew his rights, and that the separate-coach law of Kentucky did not apply to him, and declared his intention of retaining the seat he occupied. Thereupon the conductor summoned a policeman, who also requested appellant to go in the other car, and, upon his refusal, he was informed that he would be compelled to leave the car in which he was seated. Appellant, yet insisting upon his right to remain in the car in which he was, followed the policeman into the colored passenger coach." [125 Ky. 302, 101 S. W. 386.]

The court further said:

"There is really no material issue of fact involved in the case. No force or violence, or rude or oppressive conduct, was employed by the agents of appellee in removing appellant from the car in which he was seated to the car set apart for colored persons. And except that the car into which he was removed is divided by partitions into three compartments, it was substantially equal in quality, convenience, and accommodation to the car in

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which he first seated himself, and the compartment into which appellant was directed to go was clean and ample for his accommodation, and equipped with the same convenience as the other passenger coach on the train from which he was ejected."

In this the court came to the same conclusion as the jury. Plaintiff in error insists that this conclusion put out of view his rights as an interstate commerce passenger. Both courts ignored such rights, he contends, the trial court, in refusing instructions that were requested and in its ruling on the trial, and the court of appeals, in affirming the judgment which was based upon the verdict.

We need not set out the instructions nor the rulings. The complaint of the action of the court rests upon the contention that, as against an interstate passenger, the regulation of the company in providing different cars for the white and colored races is void. There is a statute of Kentucky which requires railroad companies to furnish separate coaches for white and colored passengers, but the court of appeals of the state put the statute out of consideration, declaring that it had no application to interstate trains, and defendant in error does not rest its defense upon that statute, but upon its rules and regulations. Plaintiff in error makes some effort to keep the statute in the case, and says that the trial court, by its ruling upon testimony and by its instructions, confined "the jury only to the lesser motive" of defendant's "wrongful act." In other words, as we understand plaintiff in error, confined the jury to the consideration of the regulations of the railroad company, and withdrew from its consideration the effect of the statute under which, it is said, the conductor declared he acted. But by this we understand plaintiff in error to illustrate that his rights as an interstate passenger were denied. We are, therefore, brought back to the question what his rights as such passenger were.

The elements of that question have been considered and passed on in a number of cases. And we must keep in mind that we are not dealing with the law of a state attempting a regulation of interstate commerce beyond its power to make. We are dealing with the act of a private person, to wit, the railroad company; and the distinction between state and interstate commerce we think is unimportant.

In *Hall v. DeCuir*, 95 U. S. 485, 24 L. ed. 547, the court passed on an act of the state of Louisiana, which required those engaged in the transportation of passengers among the states to give all passengers traveling within that state, upon vessels employed in such business, equal rights and privileges in all parts of the vessel, without distinction on account of race or color, and subjected to an action for damages the owner of such vessel who excluded colored passengers on account of their color from the cabin set apart for whites during the passage. It was

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held that the act was a regulation of interstate commerce and was void. The court said, by Chief Justice Waite, after stating that the power of regulating interstate commerce was exclusively in Congress, "This power of regulation may be exercised without legislation as well as with it." And that, "by refraining from action, Congress, in effect, adopts as its own regulations those which the common law or the civil law, where that prevails, has provided for the government of such business." The court further said, quoting from *Welton v. Missouri*, 91 U. S. 282, 23 L. ed. 350, that "inaction [by Congress] * * * is equivalent to a declaration that interstate commerce shall remain free and untrammelled." And added: "Applying that principle to the circumstances of this case, congressional inaction left Beason [the shipowner] at liberty to adopt such reasonable rules and regulations for the disposition of passengers upon his boat while pursuing her voyage within Louisiana or without as seemed to him most for the interest of all concerned." This language is pertinent to the case at bar, and demonstrates that the contention of the plaintiff in error is untenable. In other words, demonstrates that the interstate commerce clause of the Constitution does not constrain the action of carriers, but, on the contrary, leaves them to adopt rules and regulations for the government of their business, free from any interference except by Congress. Such rules and regulations, of course, must be reasonable, but whether they be such cannot depend upon a passenger being state or interstate. This also is manifest from the cited case. There, as we have seen, an interstate colored passenger was excluded from the privileges of the cabin set apart for white persons by a regulation of the carrier, and where the colored passenger's right to be was attempted to be provided by a state statute. The statute was declared invalid, because it attempted to force a carrier to do the very thing which plaintiff in error complains was not done in the case at bar; to wit, permit him to ride in the place set apart for white passengers. In other words, the statute was struck down because it interfered with the regulations of the carrier as to interstate passengers. This court commented on the case subsequently in *Louisville, N. O. & T. R. Co. v. Mississippi*, 133 U. S. 587, 590, 33 L. ed. 784, 785, 2 Inters. Com. Rep. 801, 802, 10 Sup. Ct. Rep. 348, 349, and said: "Obviously, whether interstate passengers of one race should, in any portion of their journey, be compelled to share their cabin accommodations with passengers of another race, was a question of interstate commerce, and to be determined by Congress alone." We have seen that it was decided in *Hall v. DeCuir* that the inaction of Congress was equivalent to the declaration that a carrier could, by regulations, separate colored and white interstate passengers.

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In *Plessy v. Ferguson*, 163 U. S. 540, 41 L. ed. 257, 16 Sup. Ct. Rep. 1138, a statute of Louisiana which required railroad companies to provide separate accommodations for the white and colored races was considered. The statute was attacked on the ground that it violated the 13th. and 14th Amendments of the Constitution of the United States. The opinion of the court, which was by Mr. Justice Brown, reviewed prior cases, and not only sustained the law, but justified as reasonable the distinction between the races on account of which the statute was passed and enforced. It is true the power of a legislature to recognize a racial distinction was the subject considered, but if the test of reasonableness in legislation be, as it was declared to be, "the established usages, customs, and traditions of the people," and the "promotion of their comfort and the preservation of the public peace and good order," this must also be the test of the reasonableness of the regulations of a carrier, made for like purpose and to secure like results. Regulations which are induced by the general sentiment of the community for whom they are made and upon whom they operate cannot be said to be unreasonable. See also *Chesapeake & O. R. Co. v. Kentucky*, 179 U. S. 388, 45 L. ed. 244, 21 Sup. Ct. Rep. 101.

The extent of the difference based upon the distinction between the white and colored races which may be observed in legislation or in the regulations of carriers has been discussed so much that we are relieved from further enlargement upon it. We may refer to Mr. Justice Clifford's concurring opinion in *Hall v. DeCuir* for a review of the cases. They are also cited in *Plessy v. Ferguson* at page 550. We think the judgment should be affirmed.

It is so ordered.

Mr. Justice HARLAN dissents from the opinion and judgment.

BRICE v. SOUTHERN RY. CO.

(Supreme Court of South Carolina, March 14, 1910.)

[67 S. E. Rep. 243.]

Carriers—Injuries to Passenger—Falling from Train—Duty of Servants.—When a passenger falls from a train running 45 miles an hour, every officer of the train, as soon as he knows of the fall, must be conscious of the impelling duty to stop the train, or to take some other prompt measure to rescue the passenger, and the failure so to do, unless in extraordinary cases, is strong evidence of a reckless disregard of duty.

Carriers—Injuries to Passenger—Falling from Train—Duty of Officers.—When a passenger falls from a train, that the conductor is in control of the train will not excuse any officer of the train, knowing of the fall, from using the highest degree of care for the safety of the passenger, either in stopping the train, or taking other prompt measures, and their failure to exercise that care is a failure of the railroad itself.

Carriers—Injuries to Passengers—Falling from Train—Care Required—Question for Jury.—In an action for injuries to a passenger falling from the platform of a moving car, while sick, the question of whether the train officers, knowing of his condition, should have safeguarded the passenger, held, under the evidence, for the jury.

Carriers—Right of Passenger to Go on Platform.—A rule that passengers must keep off the platform of moving cars is not inflexible, as a passenger may be compelled by necessity to be there.

Carriers—Injuries to Passenger—Falling from Train—Contributory Negligence.*—In an action for injuries to a passenger falling from the platform of a moving car, whether the passenger was negligent in going on the platform, held, under the evidence, for the jury.

Carriers—Injuries to Passenger—Instructions—Prima Facie Case.†—An instruction that an injury to a passenger on a train is itself prima facie evidence of negligence or liability on the part of the carrier is erroneous, because it does not limit the injuries to those arising from some instrumentality or agency of the carrier.

Appeal from Common Pleas Circuit Court of Fairfield County;
J. C. Klugh, Judge.

Action by Walter Brice against the Southern Railway Com-

*See first foot-note of second preceding case.

†For the authorities in this series on the question whether a presumption of negligence arises from the fact that a passenger was injured, see first foot-note of *Sewell v. Detroit United Ry.* (Mich.), 34 R. R. R. 453, 57 Am. & Eng. R. Cas., N. S., 453; last foot-note of *St. Louis, etc., R. Co. v. Savage* (Ala.), 34 R. R. R. 442, 57 Am. & Eng. R. Cas., N. S., 442; first foot-note of *Christensen v. Oregon S. L. R. Co.* (Utah), 34 R. R. R. 253, 57 Am. & Eng. R. Cas., N. S., 253; *Gay v. Milwaukee, etc., Co.* (Wis.), 34 R. R. R. 1, 57 Am. & Eng. R. Cas., N. S., 1.

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pany. From a judgment for plaintiff, defendant appeals. Reversed, and cause remanded for new trial.

McDonald & McDonald, for appellant.

John J. McMakan, for respondent.

WOODS, J. This appeal is from a judgment for \$500 recovered on a complaint alleging that the plaintiff, while a passenger, fell from defendant's train and received personal injuries because of the negligent and reckless failure of the conductor to properly care for him as a passenger, and because of the negligent, reckless, wanton, willful, and malicious failure of the conductor to stop the train, and of the conductor and other agents of the defendant to search for and rescue the plaintiff after he had fallen. A short summary of the evidence of the plaintiff will be sufficient to make clear the points raised by the appeal. The plaintiff, a negro laborer, boarded the train at Ridgeway and paid his fare to Columbia. Becoming nauseated, and feeling that he was about to vomit, he tried to go into the water-closet; but, finding that locked, he went on the steps of the platform between the cars and undertook to relieve himself by vomiting while standing on the steps, holding to the guardrails with both hands. At this juncture, the train officer, to whom the plaintiff had paid his fare, and whom he supposed to be the conductor, came up on his way from one car to the other. The plaintiff gives this account of the conversation and his fall: "Then he come and asked me had I paid my fare. I told him, 'Yes, sir.' He asked me what did I pay. I told him: 'I paid 77 cents. I suppose that is what you call it. I give you a dollar, and here is 23 cents'—and turned loose my hand to show the change, and when I turned loose the hand and showed him my hand, by him being on the platform and me on the step, I showed him with my hand in that direction. (Indicating.) The train went around the curve right quick, and I sorter leant out this way, but when the train struck that straight stretch it seems I had fallen. In falling I caught with my right hand and held with that hand as near as I can guess at it 75 yards." The evidence from the trainmen was to the effect that the water-closet was not locked. The officer was not in fact the conductor, but one of the train auditors who had recently been put on the defendant's trains to take up fares—a duty which had before devolved on the conductor. Although, according to the plaintiff's evidence, the officer must have known that a passenger had fallen from the train while it was going at the rate of 45 or 50 miles an hour, yet the train was not stopped, and nothing was done by the train officers for the relief of the passenger until the train reached Columbia. At the Columbia office of the defendant, the conductor left this notice: "Train auditor says negro man jumped off of thirty-three one mile north of Killians.

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Have some one to look out for this man." A motion was made for a nonsuit on the grounds: First, that there was no evidence of willfulness or recklessness on the part of the defendant; second, that there was no evidence of negligence of the defendant constituting a proximate cause of the injury; third, that the evidence admitted of no other inference than that the plaintiff was guilty of contributory negligence.

When a passenger falls from a train running at a speed of 45 or 50 miles an hour, every officer of the train, as soon as he knows of the fall, must be conscious of the impelling duty to stop the train, or to take some other prompt and efficient measure to rescue the passenger. Unless there is a necessity to go on far out of the ordinary, the failure to stop or to take some other measure likely to afford prompt relief is strong evidence of a reckless disregard of duty. This was, in effect, the testimony of every railroad employee who was examined; but it required no testimony to make the duty evident. The defendant's counsel, relying on the fact that the conductor was in control of the movement of the train, asked the court to hold that it was not the duty of the auditor to signal the train to stop. The circuit judge clearly and convincingly disposed of this position by the following language used in his charge: "So it is not only the duty of the conductor to look after the safety, comfort, and convenience of passengers, but it is the duty of the engineer so far as it comes within the scope of his other duties; it is the duty of the fireman, flagman, ticket taker, or auditor, or any other person employed on the train of the railroad company in and about its business of carrying passengers; and the failure of any one of those persons within the scope of his occupation and duty there to exercise the highest degree of care for the safety of the passenger is the failure of the railroad itself. It not only depends on the conductor, but depends on every person employed in the operation of the train." It is clearly the duty of every employee to signal and otherwise to try to stop the train, or to use other reasonable efforts for the prompt rescue of a passenger who has fallen from the train.

As to the question of negligence as to the proximate cause of the fall, we do not think that the auditor had any reason to apprehend that the plaintiff would release his hold of the guard-rail in order to show his change merely because he was asked if he had paid his fare; but it was nevertheless a question for the jury whether due care required the auditor to take steps to safeguard a sick passenger in the perilous position in which he found the plaintiff. This is sufficient to dispose of this ground of the motion without passing on any other acts relied on as constituting actionable negligence of the defendant.

The circuit court could not hold that the evidence excluded any other inference than that the plaintiff was guilty of con-

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tributory negligence. The rule is well settled that passengers should keep off the platform of moving cars. *Jarrell v. C. & W. C. Ry.*, 58 S. C. 495, 36 S. E. 910; *McLean v. Railway Co.*, 81 S. C. 100, 61 S. E. 900, 1071, 18 L. R. A. (N. S.), 763, 128 Am. St. Rep. 892. But the rule is not inflexible. A passenger may be impelled by the necessity of avoiding a greater danger, or by his respect for decency, to go on the platform. In this case there was evidence tending to show that the plaintiff in his emergency made due effort to get into the water-closet without success, and resorted to the platform because decency made it necessary. Whether the necessity existed, and whether the plaintiff was guilty of contributory negligence in releasing for an instant the grasp of one hand on the guardrail in order to convince the officer that he had paid his fare, were questions for the jury. The carrier, it is true, would not be liable to a passenger for injuries resulting from perils which such a sudden emergency impelled the passenger to take, when the carrier had not by its own negligence brought on the emergency or the peril. But in this case there was evidence from which the jury could infer that the peril of going on the steps was assumed without negligence of the passenger, on account of the neglect of the carrier to have the water-closet unlocked.

The last exception alleges error in giving the following instruction at the request of the plaintiff's counsel: "An injury to a passenger on a train is itself prima facie evidence of negligence or liability on the part of the railroad company. The burden then is on the railroad company to show that it is not liable." The error in this instruction was in the omission to limit the presumption of negligence to injuries to a passenger arising from some instrumentality or agency of the carrier. In *Anderson v. S. C. & G. Railroad Co.*, 77 S. C. 434, 58 S. E. 149, 122 Am. St. Rep. 591, the court says: "According to the rule in this state, there is no presumption of negligence on the part of the carrier from the bare fact that a passenger has been injured while on the carrier's train, but that such presumption does arise on proof of such injury as the result of some agency or instrumentality of the carrier, some act of omission or commission of the servants of the carrier, or some defect in the instrumentalities of transportation." *Steele v. Railroad Co.*, 55 S. C. 389, 33 S. E. 509, 74 Am. St. Rep. 756; *Jarrell v. Railway*, 58 S. C. 494, 36 S. E. 910; *Doolittle v. Railway Co.*, 62 S. C. 130, 40 S. E. 133; *Stembridge v. Railway Co.*, 65 S. C. 447, 43 S. E. 968; *Hunter v. Railway Co.*, 72 S. C. 340, 51 S. E. 860, 100 Am. St. Rep. 605; *Brown v. A. C. L. Ry. Co.*, 83 S. C. 53, 64 S. E. 1012. The error was important, because the evidence made an issue for the jury as to whether the proximate cause of the fall from the train was the omission of the defendant's servants to have the water-closet accessible to plaintiff in

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his emergency, or to take steps to safeguard a sick passenger, or was the act of the plaintiff himself in unnecessarily going on the platform, or in releasing his hold on the guardrail.

The judgment of this court is that the judgment of the circuit court be reversed, and the cause be remanded to that court for a new trial.

O'CALLAGHAN v. DELLWOOD PARK CO.

(Supreme Court of Illinois, Oct. 26, 1909. Rehearing Denied Dec. 9, 1909.)

[89 N. E. Rep. 1005.]

Carriers—Care Required—Operation of Scenic Railway.—The same degree of care is required for the protection of passengers in operating an ordinary scenic railroad in an amusement park as is required of common carriers of passengers, which is the highest degree of care and vigilance possible consistent with the mode of conveyance and its practical operation.

Carriers—Passengers—Negligence—Presumptions.*—If a passenger is injured by equipment wholly under the carrier's control, and the accident is of such a character that it would not ordinarily occur if due care was used, the law presumes negligence by the carrier.

Carriers—Injury to Passenger—Evidence—Presumptions.*—In an action by a passenger for injuries by being thrown from a scenic railway, testimony for plaintiff tending to show that the injury was caused by apparatus wholly under defendant's control while plaintiff was using due care, by the car suddenly slowing or stopping, accompanied by a sound as if something interfered with the car beneath it, raised a prima facie presumption of negligence.

Appeal and Error—Review—Extent of Review—On Appeal from Decision on Motion for Verdict.—In determining on defendant's appeal whether a verdict should have been directed for defendant, the court can only consider the evidence most favorable to plaintiff, and cannot disregard testimony for plaintiff because it is improbable, unless it is contrary to some natural law.

Carriers—Injury to Passenger—Sufficiency of Evidence.—In an action for injuries to a passenger by being thrown from a scenic railroad by the car in which plaintiff was suddenly slowing or stopping, in which defendant claimed plaintiff was not injured by the car stopping as claimed by him, evidence held not to show that it would be contrary to natural laws for the car to have stopped under the circumstances.

Cartwright and Dunn., JJ., dissenting.

*See last foot-note of preceding case.

O'Callaghan v. Dellwood Park Co

Appeal from Appellate Court, Second District, on Appeal from Circuit Court, Will County; A. O. Marshall, Judge.

Action by Thomas J. O'Callaghan against the Dellwood Park Company. From a judgment for plaintiff, defendant appeals. Affirmed.

This is an action on the case to recover damages for injuries which the appellee sustained September 25, 1906, at Dellwood Park, Will county, Ill., by being thrown from a "scenic railway" operated by the appellant. On the trial before a jury in the circuit court of Will county a verdict was returned for \$1,600 against appellant. Appellee was required by the trial court to remit \$400 and judgment was then entered for \$1,200. This judgment, on appeal to the Appellate Court, was affirmed. Appellant thereupon prayed this appeal.

Dellwood Park is an amusement resort managed by appellant. On the evening of the day in question the appellee, with William Kirby, went to the park, and about 9 o'clock, each having paid the regular fare of five cents, took the front seat in a car. The scenic railway is approximately 2,000 feet in length, and the cars upon it are shaped somewhat like a cutter or sleigh, having two seats, each capable of holding two adults or three children. The back of the front seat was high enough to furnish a protection for those in the back seat, while for the protection of the persons riding on the front seat there was an iron bar turning on a swivel, which was elevated to permit persons to take their seats, and was then drawn down over their laps. This was about waist high when a person was seated, and could be held onto by the passenger to steady him during the ride. Under each car were four wheels, flat and without flanges, running upon a maple rail about six inches wide, which was laid upon a plank or timber about two inches thick, resting on cross-ties. On each side of the track were guide boards 16 or 18 inches high, also a 2-inch plank and a maple strip to guide the side wheels. On each side of the car were two guide wheels which played against these maple strips. The cars ran by gravity the greater part of the distance. A part of the way the railway was upon trestlework elevated considerably above the ground. Passengers entered the car at a platform which was located on the upper edge of a valley, and was some 42 feet above the lowest point in the tracks. After they were seated, the car was started by hand, and then propelled by an endless chain up an incline, when it was released from the endless chain and dropped 15 feet down a sharp incline, thereby gaining the principal momentum for the trip. At several places the track ran up over a short artificial hill, and then dropped again. The road was circuitous, and contained numerous curves. The cars reached the foot of the incline almost directly below the start-

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ing point, and were then drawn by an endless chain up an incline to the starting platform. Nearly at the end of the portion of the road traveled by the force of gravity were two appliances called "brakes," located some distance apart, each operated by a man and intended to reduce the speed of the car, the second brake so checking it that the car could be caught by the endless chain and carried again to the starting point. On the night of the accident seven cars were in operation, running at equal distances apart, taking a little less than two minutes to make the circuit. None of the cars were accompanied by persons in charge. After appellee and Kirby had been seated in the front end of the car, as heretofore stated, and it had gone down the first declivity, the car came to a sharp curve some 500 feet from the starting point and six feet above the ground. They both testified that the motion of the car was suddenly checked, Kirby stating that the car was just barely moving and afterwards testifying that it stopped; appellee testifying that it stopped, but afterwards that he did not know whether it had stopped or not. Both of them stated that there was a grinding noise underneath. Kirby said that it sounded as if they were passing over stone and gravel, while the appellee likened it to something hanging to the side or bottom of the car. The latter sat on the left-hand side, which was the outside of the curve, and had hold of the handle bar with his left hand. When the car was thus suddenly checked on the curve, appellee was thrown out of the car and fell on the stones underneath, while Kirby was pitched forward over the handle bar, but remained in the car, which immediately resumed its motion. When it reached the second brake at the bottom of the incline, Kirby got out and hurried across to where appellee had fallen, and found him lying on the stones, seriously hurt about the face and mouth. Kirby testified that appellee was conscious, while appellee and an employee of appellant who was there at the time testified that he was unconscious. Portions of the park were lighted by electricity, but the place where this accident happened was in darkness, and there was no eyewitness to it except Kirby and appellee. Employees of appellant testified that all of the cars had been inspected on the morning of that day and were then in good order, and were again inspected a short time after the accident and nothing found wrong; that the next morning the track was inspected at the place of the accident and there was nothing there to indicate what had caused it.

E. Mcers, for appellant.

John W. D'Arcy, for appellee.

CARTER, J. (after stating the facts as above). Appellant contends that the trial court erred in giving two instructions at the request of appellee, holding, in effect, that it was the duty of the

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appellant in operating the scenic railway to exercise the highest degree of care and caution for the safety of its passengers and to do all that human foresight and vigilance could reasonably do, consistent with the mode of conveyance and the practical operation of the railway, to prevent accidents to passengers while riding on its cars. This is the rule laid down in this state as to common carriers. *Parmelee Co. v. Wheelock*, 224 Ill. 194, 79 N. E. 652; *North Chicago Street Railroad Co. v. Polkey*, 203 Ill. 225, 67 N. E. 793; *West Chicago Street Railroad Co. v. Tuerk*, 193 Ill. 385, 61 N. E. 1087; *Chicago & Alton Railroad Co. v. Pillsbury*, 123 Ill. 9, 14 N. E. 22, 5 Am. St. Rep. 483. We have also held that persons operating passenger elevators in buildings are charged with the same high degree of care. *Hartford Deposit Co. v. Sollitt*, 172 Ill. 222, 50 N. E. 178, 64 Am. St. Rep. 35; *Chicago Exchange Building Co. v. Nelson*, 197 Ill. 334, 64 N. E. 369; *Steiskal v. Field & Co.*, 238 Ill. 92, 87 N. E. 117. In *Treadwell v. Whittier*, 80 Cal. 574, 22 Pac. 266, 5 L. R. A. 498, 13 Am. St. Rep. 175, the court, in discussing the measure of care required of persons operating elevators in buildings for the carrying of passengers, stated that "the utmost care and diligence must be used by persons engaged in such employments to avoid injury to those they carry. The care and diligence required is proportioned to the danger to the persons carried. In proportion to the degree of danger to others must be the care and diligence to be exercised. Where the danger is great, the utmost care and diligence must be employed. In such cases the law required extraordinary care and diligence." This doctrine was quoted with approval by this court in *Springer v. Ford*, 189 Ill. 430, 59 N. E. 953, 52 L. R. A. 930, 8 Am. St. Rep. 464. Why is not this rule applicable to those operating cars upon a scenic railway, such as the one here in question? The passengers carried therein are subject to great risk of life and limb. The steep inclines, sharp curves, and great speed necessarily are sources of peril.

The argument of appellant that the character of this scenic railway was of itself notice of the danger to its passengers; that its presence and operation involved no danger to those who kept away from it; that in this regard it differed from steam or electric railways or passenger elevators in buildings; and that therefore such a railway should not be held a common carrier—does not appeal to us. Should the motive which causes a person to take passage make any difference as to the degree of responsibility with which the carrier is charged? Passenger elevators are frequently operated in buildings in order to convey persons to some vantage point where they can overlook a great city or some other object of interest, and trips on electric cars are often made solely for pleasure.

The precise question now under discussion has not been de-

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cided by this court, and our attention has not been called to any case where the degree of care and responsibility resting upon those managing a railway of this kind has been considered. The nearest in point perhaps is *Knottnerus v. North Park Street Railroad Co.*, 93 Mich. 348, 53 N. W. 529, 17 L. R. A. 726. That was as to the operation of a roller coaster, and the street railway company, while it owned the amusement park where the coaster was being operated, did not own or operate the device itself. Many of the authorities cited by appellant discuss only the responsibility and degree of care required of the managers and operators of ordinary places of amusement, and not the care required in the operation of scenic railways or other amusement contrivances in the nature of common carriers. See *Williams v. Mineral City Park Ass'n*, 128 Iowa, 32, 102 N. W. 783, 1 L. R. A. (N. S.) 427, 111 Am. St. Rep. 184; 5 Am. & Eng. Ann. Cas. 924, and note; *Scanlon v. Wedger*, 156 Mass. 462, 31 N. E. 642, 16 L. R. A. 395, and note; *Brotherton v. Manhattan Beach Improvement Co.*, 48 Neb. 563, 67 N. W. 479, 33 L. R. A. 598, 58 Am. St. Rep. 709; *Hallyburton v. Burke County Fair Ass'n*, 119 N. C. 526, 26 S. E. 114, 38 L. R. A. 156. We think, not only by fair analogy, but on reason and sound public policy, appellant should be held to the same degree of responsibility in the management of the railway in question as a common carrier.

At the close of plaintiff's evidence, and also at the close of the case, counsel for the appellant moved to instruct the jury to find for the defendant on the ground that there was no evidence to support the charge of negligence as made in the declaration. Appellant insists that the recent case of *Lumsden v. Thompson Scenic Railway Co.*, 130 App. Div. 209, 114 N. Y. Supp. 421, upholds its contention on this question. We do not deem that case in point, as there no unusual or extraordinary motion of the car was shown by the proof, and there was no evidence that anything happened upon the trip which was not usual and made necessary by such ordinary motion. Here there was a sudden stop testified to by appellee and his companion, caused, apparently, by something on the track. It is very clear from the testimony that this was an unusual occurrence. A presumption of negligence has been held to exist against the carrier in cases where the accident has been caused by a sudden jerk of the train. *Chicago City Railway Co. v. Rood*, 163 Ill. 477, 45 N. E. 238, 54 Am. St. Rep. 478; *Dougherty v. Missouri Railroad Co.*, 81 Mo. 325, 51 Am. Rep. 239.

If the injury of a passenger is caused by apparatus wholly under the control of a carrier and furnished and managed by it, and the accident is of such a character that it would not ordinarily occur if due care is used, the law raises a presumption of negligence. This presumption arises from the nature of the

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accident and the attending circumstances, and not from the mere fact of the accident itself. *Barnes v. Danville Street Railway Co.*, 235 Ill. 566, 85 N. E. 921, 126 Am. St. Rep. 237; *Chicago Union Traction Co. v. Giese*, 229 Ill. 260, 82 N. E. 232; *Chicago City Railway Co. v. Rood*, supra. We think the proof offered on behalf of the appellee brings this case squarely within the rule laid down in these decisions. Appellant was charged with the responsibility of a common carrier. Appellee had paid his fare and was riding in a car of the railway in charge of appellant. The testimony on behalf of appellee tends to show that he was using due care, and that the injury was caused by apparatus wholly under the control of appellant and furnished and managed by it, and that the accident was of such character that it would not ordinarily occur if due care had been used by appellant in the management of its railway. This is sufficient prima facie proof of negligence to impose upon appellant the onus of rebutting it. On this proof the law raises a presumption of negligence.

Counsel for appellant earnestly insists that these authorities do not apply in this case, and bases his contention, as we understand his argument, on the fact that the evidence of appellee and his companion, Kirby, is so unreasonable that it should be rejected. Counsel insists that the proof shows that the seven cars on the scenic railway at the time of the accident were running about ten seconds apart, and that if the car carrying the appellee and Kirby had been stopped or checked, as testified to by them, the car following would have bumped into it. The argument is also made that if the car in which appellee was riding had been slowed up or stopped, as they testified, the car, being on a curve at the time of the accident, would not have been able from the grade to gain enough motion to reach the end of the line. Appellant insists in this connection that appellee could not have been thrown out of the car, as claimed by himself and Kirby; that they must have been standing up in the car and scuffling, because Kirby, when the car reached the end of the line, had appellee's hat in his hand. No direct testimony supports such a conclusion, and we do not think it can be fairly inferred from any evidence in the record. Conceding, for the sake of the argument, that the testimony of appellee and his associate might for any reason be improbable, we cannot on that account disregard it. In the recent case of *Zetsche v. Chicago, Peoria & St. Louis Railway Co.*, 238 Ill. 240, 244, 87 N. E. 412, 413, we considered this identical question, and we there said: "The Appellate Court and the trial judge are required by the law, upon the question being properly raised, to take into consideration the element of improbability, and, if either regards the verdict as clearly against the preponderance of the evidence, a new trial should be awarded. We cannot, upon consideration

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of this motion, reject testimony, unless it is contrary to some natural law, as, for example, evidence that on a certain occasion the sun at noontime in this latitude cast a shadow to the south." It appears from the evidence that the rails upon which these cars ran were greasy from the oil and grease that fell from the cars and that the bearings of the cars were frequently oiled. We cannot say from the record before us that it would be contrary to the laws of nature, even if the car came to a full stop, for it to move on again on account of the grade and without being bumped by the car coming next behind it. The proof most favorable to the appellee, on consideration of the motion to find for the appellant, stands alone. We can consider nothing else. *Libby, McNeill & Libby v. Cook*, 222 Ill. 206, 78 N. E. 599; *Pronskevitch v. Chicago & Alton Railway Co.*, 232 Ill. 136, 83 N. E. 545; *Reiter v. Standard Scale Co.*, 237 Ill. 374, 86 N. E. 745.

The motion for a peremptory instruction was properly denied. The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

CARTWRIGHT and DUNN, JJ., dissent.

MULLIGAN *et al.* v. SOUTHERN RY. CO.

(Supreme Court of South Carolina, Nov. 4, 1909.)

[65 S. E. Rep. 1040.]

Carriers—Carriage of Passengers—Action for Delay—Evidence—Admissibility.—Civ. Code, § 2170, as amended Feb. 20, 1903 (Laws 1903, p. 85), requires railroad companies to keep posted, in stations along its line, bulletins of trains delayed for more than half an hour, and gives a remedy for any grievance for noncompliance with its terms. Plaintiff, in an action against a railroad company, because of the delay of a train upon which he expected to travel was allowed to testify as to the posting of bulletins by the agent as to the time his train was expected, and that the agent told him of a telegram announcing that his train had been annulled, and that the agent said he did not know what the trouble was with the train. Held that, although section 2170 gives an exclusive remedy for noncompliance with its terms, this testimony was admissible, it being responsive to the allegation of the complaint; it also being the agent's duty to give a passenger, upon request, all reasonable information within his knowledge, and not known by the passenger, as to the arrival of a train which he was to take.

Carriers—Action for Delay—Evidence—Relevancy.—This evidence was relevant to show whether the railroad company had breached

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its duty to exercise proper care to carry plaintiffs to their destination with promptness.

Carriers—Action for Delay—Instructions.—In an action against a railroad company because of the delay of a train upon which plaintiffs expected to travel, an instruction that, notwithstanding the timetable, if an agent of the company made a positive statement to the purchaser of a ticket, and informing him about his train, such statement would govern the contract as to the conditions mentioned in the time-table, and in such a case the jury might consider both in getting at the contract between the passenger and the railroad company, etc., was misleading, as it bound the defendant to a guaranty of the schedule by an agent, even though the passenger knew that the agent had no authority to do so.

Carriers—Negligent Delay to Passenger—Liability.*—A carrier cannot by contract limit its common-law liability for injury for negligence, but where a passenger has, or should have, knowledge that the schedules as published are not guaranteed by the carrier, he takes passage subject to such delays as are not due to negligence or willful act of the carrier; but if the carrier negligently fails to make the public schedules, a passenger injured thereby may recover.

Carriers—Negligent Delay to Passenger—Presumptions—Nonsuit.—In an action against a railroad company because of the delay of a train upon which plaintiff expected to travel, where there was evidence of long delay in making schedule connections resulting in some expense and loss of time to a passenger, a presumption of negligence arose which it was incumbent on the carrier to negative; the carrier being the only one that could make such explanation.

Carriers—Negligent Delay to Passenger—Evidence.—In an action against a carrier for delay to a passenger, the presumption of negligence from long delay held not so completely rebutted as to leave no question for the jury.

Carriers—Negligent Delay—Presumptions.—In an action against a railroad company because of the delay of a train upon which plaintiff expected to travel, a presumption that defendant was negligent because of long delay in making connections according to schedule rebutted the presumption that defendant willfully caused the delay, since two contrary presumptions will not arise from the same fact.

Carriers—Negligent Delay—Nonsuit.—In an action against a railroad company for damages because of delay of a train upon which plaintiff expected to travel, evidence held not sufficient to go to the jury on the issue of willful delay.

Appeal from Common Pleas Circuit Court of Aiken County;
John S. Wilson, Judge.

Action by B. F. Mulligan and another against the Southern

*As to the liability of carriers of passengers for failure to transport promptly, see extensive note, 33 R. R. R. 636, 56 Am. & Eng. R. Cas., N. S., 636.

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Railway Company. From a judgment for plaintiffs, defendant appeals. Reversed and remanded.

Hendersons, for appellant.

Davis, Gunter & Gyles, for respondents.

JONES, C. J. The plaintiffs, husband and wife, having purchased tickets from Langley, S. C., to Pineland, S. C., and return, became passengers on defendant's train at Langley, at about 6:30 p. m. December 24, 1900, and about 8 o'clock p. m. reached Blackville, S. C., a junctional point, where they expected to take train No. 29 running from Washington to Florida, scheduled to reach Blackville at 2:52 a. m., and to arrive at Pineland at 4:31 a. m. Christmas morning. Mr. Mulligan's intention was to spend Christmas holiday in the home of his parents living at Pineland, and returning leave Pineland at about 2 a. m. on the 26th, and reach Langley at 6:22 a. m., to resume his business that morning. Mrs. Mulligan, with the two small children accompanying, expected to remain at Pineland for several days before returning. Train 29 was about 13 hours late, and, after 12 hours late, was annulled as such, and ran as first section of No. 33 due to arrive at Blackville at 1:45 p. m. The Blackville agent notified Mr. Mulligan of the annulment of 29 some minutes after 10 a. m. Finding that he could not go to Pineland and return as contemplated, Mr. Mulligan returned to Langley that afternoon, while Mrs. Mulligan and children awaited 29, then running as 33, which arrived at Blackville at 3:59 p. m., and carried her to Pineland, arriving about 7 p. m., 13 hours later than contemplated. This delay deprived plaintiffs of the pleasure of spending Christmas holiday and attending a family reunion at the home of their parents, and entailed some actual expense, which plaintiff estimated at \$9.25, including his return ticket, \$3.83, and return fare to Langley, \$1.15, and hotel expenses for self and family at Blackville, \$4.25. The complaint charged that this delay, disappointment, worry, and expense were the result of the negligent and willful disregard of plaintiff's rights by defendant to plaintiffs' damage \$1,900. Judgment for \$500 was recovered, and the defendant appeals.

We first notice the exceptions to the rulings as to admissibility of testimony. Plaintiff was allowed to testify as to the posting of bulletins by the Blackville agent as to the time when train 29 was expected to arrive, and as to the conversation with the agent touching the same. Objection is made that since section 2170, Civ. Code 1902, as amended Feb. 20, 1903 (Laws 1903, p. 85), gave a remedy in the event of any grievance from non-compliance with its terms, such remedy was exclusive, and the matter could not be brought into this action, and that the Blackville agent had no duty to perform in respect to plaintiffs' trans-

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portation, except to post such notices. Some time after arrival in Blackville plaintiffs were informed by the agent that 29 would not arrive before 6 a. m. They went to the hotel and retired, returning to the station by 6 a. m. Successive bulletins every half hour were posted showing expected arrival of 29 until 10 a. m. Plaintiff testified that a few moments after this time the Blackville agent informed him that he had just received a telegram announcing that 29 had been annulled, and would not come. The agent further told plaintiff that he did not know what was the trouble with 29. There was no error in admitting the testimony, because it was responsive to the allegations of the complaint, and because it was within the scope of the duty of an agent at a junctional station to give the passenger, when requested, all reasonable information within the agent's knowledge and not within the passenger's knowledge, as to the arrival of the connecting train which the passenger is to take. The testimony was relevant, for what it was worth, with a view to show whether defendant had breached its duty to exercise proper care to carry plaintiffs to their destination with promptness as alleged.

In this connection we notice appellant's exception to the charge "that, notwithstanding the time-table or schedule, if an agent of the company makes a positive statement to a passenger who buys a ticket, and informs him that the train is coming; how long delayed; why it cannot be there—then that comes in and governs the contract as to the conditions mentioned in the time-table; and where a case of that kind occurs, you have a right to consider both, in getting at the contract between the passenger and the railroad company. In other words, this time-table does not keep a passenger from getting verbal agreements in addition to what is embodied in that time-table." The time-table which was delivered to plaintiff at the time of the contract of transportation at Langley contained this notice: "Southern Railway, General Offices, Washington, D. C. Notice. These time-tables show the time at which trains may be expected to arrive and depart from the several stations, and to connect with other trains, but their departure or arrival or connection at the time stated is not guaranteed. The time of connecting transportation companies is published for the information of passengers and every care is taken to keep it correct, but this company does not hold itself responsible for any errors or omissions therein. W. H. Taylor, General Passenger Agent, Washington, D. C." At the bottom of said page the following notice is printed: "For exact rates, dates of sale and other detailed information, apply to nearest Southern Railway agent or agents of connecting line." Plaintiff testified that he informed the agent at Langley of his purpose to attend the Christmas dinner, and family reunion, at the home of his parents, and his purpose

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to return on the morning of December 26th; that they went over the time-table together; that the agent ascertained by wire that 29 was still on the schedule; and that the agent represented that he would certainly connect at Blackville with 29 at 2:52 a. m., and advised him to take the 6:30 train leaving Langley. Defendant's agent testified that he made no guaranty as to schedules. Appellant contends that the charge was erroneous because any representation made by defendant's agent in a nature of a guaranty of the schedule was beyond the authority of the agent, in view of the notice in the time-table. We think the charge was misleading, because it bound the defendant to a guaranty of the schedule by an agent, even though the passenger had notice that the agent had no authority to do so. The carrier cannot by contract limit its common-law liability for injury resulting from its negligence, but if the passenger has, or should have, knowledge that the schedules as published are not guaranteed by the carrier, he takes passage subject to such delays in making advertised schedules and connections as are not due to the negligence or willful act of the carrier; but, if the carrier negligently fail to make the public schedules, the passenger injured thereby may recover damages. *Miller v. Railway Co.*, 69 S. C. 133, 48 S. E. 99. Note to 32 L. R. A. 543, 544.

At the close of plaintiff's testimony defendant moved for a nonsuit as to the action based upon negligence, and also separately as to the action based upon willfulness, on the ground that there was no evidence to sustain either cause of action. At the close of all the testimony, which included defendant's explanations as to the cause of the delay, motion for nonsuit as to the cause of action based on willfulness was made. This same question was renewed by request to instruct the jury. As to negligence, we think there was no error in refusing the nonsuit. When there is evidence of a long delay in making schedule connections resulting in some expense and loss of time to a passenger, as in this case, a presumption of negligence arises, and it is incumbent on the carrier to show that such failure was not the result of negligence. This is fair and just, as the carrier is the only one that can make such explanation. *Miller v. Railway*, 69 S. C. 125, 48 S. E. 99; *Taber v. Railway*, 81 S. C. 317, 62 S. E. 311. While the evidence showing explanation in this case is minute and strong, covering many delays, some brief and some long, owing to the numerous causes; the delay in starting at Washington waiting on Northern connections; the extremely cold weather; the pressure of the Christmas traffic and travel; the failure of the engine to steam well on account of weather conditions; the blocking of the track by the breaking down of an engine; shortage of water, and the necessity to put out the fire in engine; the bursting of water tank, and freez-

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ing of switches—all tending to show an unprecedented series of obstructions to prompt passage, but we are nevertheless unwilling to declare that the presumption of negligence has been so conclusively overthrown as that it was not proper to leave to the jury to pass upon completeness of the explanation. But we are clearly of the opinion that there was no evidence of any willful breach of duty to plaintiffs. The very fact that long delay in making schedules warrants the presumption of inadvertent negligence excludes the presumption of willfulness, for two contrary presumptions will not arise from the same fact. If the explanation fails to overthrow the presumption of negligence, it certainly rebuts any imputation of wanton or intentional disregard of duty warranting punitive damages. Even if the rule applied to the transportation and delivery of telegraphic messages should apply, and the law should authorize a presumption of willfulness from long, unexplained delay in making schedules, the uncontradicted evidence in this case repels the idea of any willful breach of duty. *Roberts v. Tel. Co.*, 73 S. C. 529, 53 S. E. 985, 114 Am. St. Rep. 100; *Butler v. Tel. Co.*, 77 S. C. 154, 57 S. E. 757.

The cases of *Fort v. Southern Ry.*, 64 S. C. 423, 42 S. E. 196, and *Aaron v. Southern Ry.*, 68 S. C. 98, 46 S. E. 556, support appellant's view that nonsuit should have been granted as to the action based upon willfulness. The case of *Miller v. Southern Ry.*, 69 S. C. 117, 48 S. E. 99, is not to the contrary. In that case the motion for nonsuit was upon the whole case, alleging both a negligent and willful tort, and further there was in that case no attempt on the part of the conductor to give information to passengers on board as to the wreck ahead, which he possessed, and which, if given, would have avoided much of the inconvenience suffered by the passenger. In this case it does not appear that the agents of defendants withheld from plaintiffs any information they had, which, if communicated, would have avoided the causes of injury alleged. There was no other way that plaintiffs could have pursued their journey or avoided the expense and delay than in the way they did, even if they had been informed of the delay of 29 immediately on reaching Blackville. The agents both of Langley and Blackville appear to have been solicitous to inform plaintiffs. The Blackville agent notified them that 29 would not arrive before 6 a. m., and thus they were enabled to take rest at the hotel, and the successive bulletins, so far as appears, conveyed all the information the agent possessed, and plaintiff testified that as soon as the agent got the news at 10 a. m. that 29 had been annulled, plaintiff was informed of it. The explanation that a train is "annulled" when 12 hours late, and thereafter run as extra, or as a section of an-

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other train, was ample to show that agent was giving correct information.

We do not deem it necessary to further consider the exceptions, as the foregoing is sufficient to warrant a new trial.

The judgment of the circuit court is reversed, and the case remanded for a new trial.

RHEA v. MINNEAPOLIS ST. RY. CO.

(Supreme Court of Minnesota, June 17, 1910.)

[126 N. W. Rep. 823.]

Carriers—Injuries to Passengers—Evidence—Directing Verdict—Presumption of Negligence.*—Plaintiff's intestate, while a passenger upon one of defendant's street cars, for some causes not clearly shown by the evidence, fell upon the floor of the car and was injured. It is held (1) that the trial court properly directed a verdict for defendant on the ground that there was no evidence of negligence on the part of defendant in the operation of its car or otherwise; and (2) that no presumption of negligence arose from the fact that decedent fell upon the floor of the car and was injured, there being no evidence tending to show that defendant was in any way responsible for the fall.

(Syllabus by the Court.)

Appeal from District Court, Hennepin County; Andrew Holt, Judge.

Action by Mary Belle Rhea, as administratrix, against the Minneapolis Street Railway Company. Verdict for defendant. From an order denying a new trial, plaintiff appeals. Affirmed.

Wilson & Mercer, for appellant.

John F. Dahl, W. O. Stout, and *D. R. Frost*, for respondent.

BROWN, J. Action for the alleged wrongful death of plaintiff's intestate, in which a verdict was directed for defendant, and plaintiff appealed from an order denying a new trial.

Decedent was a passenger upon one of defendant's street cars in the city of Minneapolis, and, plaintiff claims, received an injury, caused by the negligence of defendant, which subsequently resulted in his death. The complaint alleges as grounds of negligence that the car upon which decedent was a passenger was overloaded and crowded; that he was unable, when first going upon the same, to obtain a seat, and was compelled to remain

*See extensive note, 31 R. R. R. 697, 54 Am. & Eng. R. Cas., N. S. 697.

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standing: that when the car came to a stop, soon after he took passage, to permit a passenger to alight, decedent started from the rear platform to the seat vacated, and, as he did so, defendant's servants negligently and carelessly so operated the car that it was suddenly brought to an unreasonably and dangerously quick stop, thereby causing decedent to catch his foot on the step leading into the car, throwing him violently to the floor, and severely injuring his person. Defendant denied generally its negligence, admitted that, while a passenger as alleged in the complaint, decedent "fell down in the car," but denied that the fall was caused by any act of negligence on its part. At the conclusion of the trial the court directed a verdict for defendant, on the ground that the evidence failed to make out a case of negligence.

Plaintiff contends (1) that the affirmative evidence of negligence offered on the trial was sufficient to take the case to the jury; and (2) that there is a presumption of negligence in cases of this kind, arising from the happening of an accident, which justified a submission of the case to the jury, even though the affirmative evidence on the subject to be held insufficient. We are unable to concur in either of these contentions.

1. The only evidence offered by plaintiff for the purpose of showing negligence was that of the witness Williams, a passenger on the car, who was in plain view of decedent at the time he fell and was injured. He testified that decedent was upon the rear platform of the car, and that, as the conductor rang the bell as a signal to the motorman to proceed after the car had stopped to permit the passenger to alight, he started into the car, and tripped his foot, and fell down. In reference to the alleged sudden starting or jerking of the car, the witness testified: "A. As the conductor rang the bell, Mr. Rhea started to come in; that is, he stepped from the platform when the car started. Q. Then what happened? A. He fell. Q. Did the car start suddenly? A. Well, the way cars ordinarily start; it started quickly. Q. It started quickly? A. Well, that is the ordinary way the car starts. * * * A. He started to come in as the signal was given by the conductor to start the car. Q. Did he have either foot on the inside of the car, so far as you know? A. As I remember, he just started to raise one foot in; he tripped on his foot. Q. Caught his right foot. A. Yes."

On cross-examination he testified as follows: "A. He was standing, as far as I can remember, on the left-hand side of the car going into the door. The car stopped, and I think they let off a lady passenger, and the conductor had his hands upon the bell cord ready to give the signal to go ahead, and just the moment that the conductor gave the signal to go ahead Mr. Rhea started to cross diagonally to that seat. The same time he started, the same time the bell rang, and that caused him to

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fall forward. Q. How long had you ridden on the street cars here in the city? A. I had been riding on the cars about that same time each morning for the last three years. Q. You say you noticed no difference in the starting of the car on this occasion than you had previously? A. No, sir; I know the car started with a kind of a momentum jerk. Q. Did he fall just as he was crossing up the little step—going up from the little step? A. I was looking right at him when he fell. He had one foot clear into the car before the car started. The bell rang, and he started with the other foot, and down he went.”

On redirect examination he testified: “Q. Would you say this momentum jerk was a usual thing on that line? A. Well, this was a regular ordinary jerk of the car that starts out. Q. That they have on this line? A. Yes. Q. And have had during three years? A. Yes.” On cross-examination he testified: “Q. Did this car start any different than cars ordinarily do? A. Unless they have a new motorman on. I can always tell when they have one on. Q. Did you have any such idea that a new motorman was on? A. No, sir.”

There was no other evidence upon this branch of the case, and we are clear that it wholly failed to make out a case of negligence against defendant. The only jerk or sudden movement was that ordinarily incident to starting a car, and, whether the car was crowded, and some of the passengers remained standing, or not, defendant cannot be held liable on this showing. It was not negligence within the meaning of the law, because the usual and ordinary movement of the car.

2. It is also claimed that there is a presumption of negligence in cases of this kind arising from the happening of the accident. We are cited to no authority sustaining this position on facts like those here presented. The only fact shown by the evidence from which the presumption is claimed to arise is that decedent, while a passenger, fell upon the floor of the car and was injured. There is no claim that the car was in any way defective or out of repair, no evidence that it was improperly operated, no collision or derailment, or other attending circumstances, tending to locate responsibility for decedent's fall. Clearly, without some such showing, no presumption of defendant's negligence can be indulged. *Breen v. Railway Co.*, 109 N. Y. 297, 16 N. E. 60, 4 Am. St. Rep. 450; *Wadsworth v. Railway Co.*, 182 Mass. 572, 66 N. E. 421; *Mitchell v. Railway Co.*, 51 Mich. 236, 16 N. W. 388, 47 Am. Rep. 566; *Spencer v. Railway Co.*, 105 Wis. 311, 81 N. W. 407. In other words, decedent's fall upon the floor of the car was not shown to have been occasioned by any act or omission on defendant's part, and the rule invoked does not apply. Note to *Cincinnati Traction Co. v. Holzenkemp*, 113 Am. St. Rep. 1000; *Fewings v. Mendenhall*, 88 Minn. 336, 93 N. W. 127, 60 L. R. A. 601, 97 Am. St. Rep. 519.

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3. The further contention that the trial court erred in excluding certain evidence tending to show that the car on this occasion was overcrowded requires no extended mention. The only effect of that situation was that he was required to remain standing; but, whether crowded or not, no recovery can be had for an injury not resulting from that condition, except by bringing the case by sufficient evidence within the rules and principles of the law of negligence. And, had the evidence upon this subject been admitted, a verdict for defendant would have followed, precisely as it did without evidence, for the crowded condition of the car was not the cause of the accident.

Order affirmed.

CENTRAL OF GEORGIA RY. CO. v. BROWN.

(Supreme Court of Alabama, Feb. 3, 1910.)

[51 So. Rep. 565.]

Carriers—Passengers—Injuries to Passengers—Presumptions—Burden of Proof.*—The rule that proof that a passenger is injured casts on the carrier the burden of proving its freedom from negligence does not apply, where the passenger's evidence shows that his injury resulted probably from some unavoidable cause and some cause outside the ordinary supervision and control of the carrier, and in such a case the burden rests on him to reasonably satisfy the jury that his injury is justly attributable to the carrier's negligence.

Carriers—Passengers—Injuries to Passengers—Presumptions—Burden of Proof.—Where a passenger was injured by being thrown from the platform of the coach by a lurch of the train no more violent than the lurching of trains commonly incident to their rapid movement when operated with due care, the passenger has the burden of proving that his presence on the platform while the train was in motion was due to the carrier's negligence.

Carriers—Injuries to Passengers—Contributory Negligence—Question for Jury.†—Whether a passenger, injured by being thrown from the platform of the coach by a lurch of the train, was guilty of contributory negligence in being on the platform, held, under the evidence, for the jury.

Carriers—Injuries to Passengers—Negligence.—Whether a carrier failed to furnish proper accommodation for a passenger inside of a coach, and made it necessary for him to stand on the platform, from

*See foot-note of preceding case.

†See last foot-note of *Davis v. Atlanta & C. A. L. Ry. Co. (S. Car.)*, 34 R. R. R. 249, 57 Am. & Eng. R. Cas., N. S., 249.

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which he was thrown by a lurch of the train, held, under the evidence, for the jury.

Carriers—Injuries to Passengers—Complaint—Evidence.—A complaint in an action for injury to a passenger, thrown from the platform of a coach by the lurch of the train, which alleges negligence generally as to the manner in which the carrier conducted its business as such, is broad enough to cover negligence of the conductor in requiring the passenger to leave the coach and stand on the platform, in the absence of allegations of specific negligence of a different sort.

Carriers—Injuries to Passengers—Negligence.—The act of the conductor in requesting a passenger to go on the platform of a coach because of the crowded condition of the coach is an act done in managing the train.

Carriers—Injuries to Passengers—Issues, Proof, and Variance.—A complaint in an action for injuries to a passenger thrown from the platform of the coach by a lurch of the train, which alleges the duty of the carrier to furnish sufficient coaches for the passengers, and that it failed to furnish to the passenger a safe place in which to travel, and that in consequence thereof the passenger was in an unsafe place, is supported by evidence that the conductor required the passenger to surrender a safe place inside the coach and to occupy an unsafe place on the platform because of the crowded condition of the coach; for if it was necessary for the passenger to go on the platform, and he went there under the pressure of that necessity and in obedience to the request of the conductor, the platform was for the time the place furnished him.

Appeal and Error—Verdict—Conclusiveness.—A verdict approved by the trial judge will not be disturbed on appeal, unless the court has an abiding conviction that error has been committed.

Appeal from City Court of Birmingham; H. A. Sharpe, Judge.

Action by Miles Brown against the Central of Georgia Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

London & London, for appellant.

Stallings & Drennen, for appellee.

SAYRE, J. Plaintiff sued as a passenger. The case was tried on the general issue, there being no plea of contributory negligence. Plaintiff was standing upon the platform of the moving train, and, according to his version of what happened, he had just released his hold upon the railing, and turned to go into the door, when a lurch of the car as it moved around a curve caused him to fall to the ground, with the result that he received the injuries complained of. It does not appear that there was anything out of the ordinary in the operation of the train.

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or that it was operated in a way which could have caused injury to a passenger not exposed to danger by being on the platform as was the plaintiff.

Not in every case of injury to a passenger does a presumption of negligence on the part of the carrier arise from the happening of the injury. In *Georgia Pacific v. Love*, 91 Ala. 432, 8 South. 714, 24 Am. St. Rep. 927, this court, limiting the application of certain expressions used in *Louisville & Nashville v. Jones*, 83 Ala. 376, 3 South. 902, said, quoting the language of the Supreme Court of Missouri in *Dougherty v. Missouri Railroad*, 81 Mo. 325, 51 Am. Rep. 239, "that where the vehicle or conveyance is shown to be under the control or management of the carrier or his servants, 'and the accident is such as, under an ordinary course of things, does not happen if those who have the management use proper care,' it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care." It is sometimes stated that the fact that a passenger is injured on a carrier's train raises the presumption of negligence and casts upon it the burden of showing that it was not guilty of negligence. But it is evident that there are cases in which that broad statement cannot be made, for example, a case in which the plaintiff's evidence shows his injury to have resulted probably from some unavoidable cause—some cause outside the ordinary supervision and control of the carrier. In such case it would be too broad a statement of the rule to say that a presumption of negligence arises from the happening of accident and injury to a passenger, and in such case the burden must rest upon the plaintiff, in consonance with the universal rule of judicial procedure, to reasonably satisfy the jury that his injury is justly attributable to negligence on the part of the carrier. *Elliott on Railroads*, § 1644. This limitation upon the broad doctrine occasionally stated was recognized by this court in *Montgomery & Eufaula Ry. Co. v. Mallette*, 92 Ala. 209, 9 South. 363, also.

Assuming, for the argument, that plaintiff received his injuries by being thrown from the platform of the train by a lurch or jerk no more violent than the lurching or jerking of trains commonly known to be a necessary incident to their rapid movement when operated with due care, as was the case which his evidence tended to show, and as was the case according to appellant's contention, an application of the principle stated above to the issue made by the pleadings and the evidence leads to the conclusion that the burden rested upon the plaintiff to reasonably satisfy the jury that his presence upon the platform while the train was in motion was due to negligence on the part of the defendant. From the evidence touching this point of the case the jury was authorized to find that the plaintiff got upon the train at Birmingham for the pur-

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pose of being carried to Columbus, Ga. The plaintiff was a negro, and the car into which he might lawfully go was a partitioned car, one-half of which was set apart for people of his race. All the seats were occupied, and the aisle was filled to its capacity with passengers standing. Plaintiff, with others, was standing near the door. At one stop—possibly at another, also—before reaching Henry Ellen, near which station plaintiff received his injuries, the conductor said to the men standing near the door that they were to give passengers room to get on and off at stations. At Henry Ellen plaintiff went out upon the platform. Passengers got on and off. Very soon after the train had moved away from the station, and just as plaintiff released his hold upon the railing and started to re-enter the door of the car, impeded somewhat by another, who had also got upon the platform, and who preceded plaintiff in passing through the door, the train struck a curve in the track, which had the effect to throw plaintiff from the platform. Whether, under the circumstances detailed, the plaintiff was at fault in his interpretation of the conductor's command, and in going upon the platform, or whether his presence there was to be referred to the failure of the defendant company to furnish proper and safe accommodation for him inside of the car, was in our judgment a question for the decision of the jury.

The first and second of the counts submitted to the jury, alleging negligence generally as to the manner in which the defendant conducted its business as a carrier—a method of allegation approved by a long line of cases in this state—it seems to be conceded, are broad enough to cover negligence of the defendant's conductor in requiring plaintiff to leave the coach and stand upon the platform; nor were there in these counts allegations of specific negligence of a different sort to exclude proof of negligence of the particular character just referred to. The court, with the consent of the plaintiff, charged the jury as follows: "I charge you that the burden of proof is on the plaintiff to establish to your reasonable satisfaction that he was thrown or fell from the train of the defendant by reason of the negligent manner in which the train was handled or managed; and, unless he has so reasonably satisfied you by the evidence, your verdict must be for the defendant." Appellant construes this charge to have meant that the negligence of the conductor, assuming that the jury found there was such negligence, in requiring the plaintiff to go upon the platform, was not negligence in the handling or management of the train, and the effect of its contention is that a consistent ruling on the part of the trial court would have resulted in the general affirmative charge for the defendant as to counts 1 and 2. But we think the appellant misconstrues the charge, and that its argument looks rather more critically at the complaint than a practical administration

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of justice can be made to tolerate. Appellant was operating its train for the transportation of plaintiff as a passenger. If, in the course of doing that, it negligently caused plaintiff to take a place on the train where he was exposed to danger from the operation of the train in a way which, apart from plaintiff's danger thus brought about, would have been customary and free from negligence, and by reason thereof he was thrown or caused to fall from the train, it would require unusual and unuseful refinement for us to say that the cause of his injury was not the management of the train. So far as plaintiff was concerned, the train was managed when plaintiff was required to go upon the platform. Doubtless the conductor had in mind that he was managing at that time the train and the plaintiff, too, and so he was.

Count 3 of the complaint, to state its effect briefly, alleges the duty on the part of defendant to furnish sufficient cars for the transportation of the passengers it undertook to carry, and complains that defendant failed to furnish to him, its passenger, a safe place in which to travel, with the result that plaintiff was caused by its negligent conduct in that regard to be in an unsafe place, to wit, on the platform. The insistence for appellant is that the negligence here counted on is predicated entirely of the defendant's failure to furnish a safe place in which to travel; whereas the negligence shown, if any, was the negligence of the conductor in requiring the plaintiff to surrender the safe place he had inside the coach and to occupy an unsafe place. In short, the argument is that there was a variance between allegation and proof. But this argument hardly meets the merits of the case. It assumes, without sufficient warrant, not only that the inside of the car, where plaintiff was able to stand, was, under the conditions obtaining, a safe place, for the sole reason that plaintiff was not, while so standing, liable to the particular peril of being thrown from the car, but that, if plaintiff, under the pressure of an overcrowded car and an order from the conductor, took his place upon the platform, it cannot be said that the carrier furnished the platform as a place on which to travel. But the fact is that defendant assumed to furnish suitable and safe accommodation to as many passengers as it undertook to carry. Accommodation was furnished to each passenger in contemplation of the right of every other passenger to the use of the aisle of the car for all necessary and proper purposes, and especially the purpose of getting on and off the train. We have no difficulty in reaching the conclusion that, if plaintiff was furnished only such a place in a crowded car as that a due regard for the rights of other passengers made it necessary for him to go upon the platform, and he went there under the pressure of that necessity and in obedience to the command of the conductor.

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the platform was for the time the place furnished to him for his transportation. On the facts hypothesized it was the fault of the carrier that the passenger was on the platform—an unsafe place—when he was injured. The jury might have referred plaintiff's injury to the failure to furnish sufficient cars and a safe place within which to travel, or to the negligence of the conductor in ordering him to go upon the platform. It might well have been either default in duty was adequate to account for plaintiff's hurt, though both may have contributed to the result. The conductor's command may have constituted negligence, and may at the same time have been evidential of a faulty status which gave occasion for it.

We need not discuss the evidence pro and con in response to appellant's contention that the trial court ought to have granted its motion for a new trial. The principles controlling the cause in this respect were so well settled in *Cobb v. Malone*, 92 Ala. 633, 9 South. 738, and that case has been so often quoted and followed, as to leave no occasion for further statement. It is to be conceded that appellant's evidence to establish a version of the occurrence under examination which would relieve it of all responsibility in the premises was such that, if the trial court had seen fit to set aside the verdict, we would not feel justified in interfering; but a proper and necessary adherence to the law of appellate procedure declared for such cases, as well as an appreciation of the disadvantages under which this court labors when it undertakes to review the finding of a jury, and the weight which must be accorded to the judgment of a trial judge exercising his power to the end that justice may be done, leave us without that abiding conviction of error which alone would justify us in reversing the ruling of the court below.

What has been said will suffice to disclose our opinion that the judgment of the court below must be affirmed.

Affirmed.

DOWDELL, C. J., and ANDERSON and McCLELLAN, JJ., concur

JENKINS *v.* ATLANTIC COAST LINE RY. CO.

(Supreme Court of South Carolina, Nov. 30, 1909.)

[66 S. E. Rep. 415.]

Appeal and Error—Questions Not Raised at Trial—Jurisdiction of Justice of the Peace.—The jurisdiction of a magistrate to try an action against a carrier to recover a penalty for failure to adjust a claim for loss or damage to freight within the statutory period cannot be raised for the first time on appeal to the Supreme Court.

Carriers—Loss of Freight—Connecting Carriers—Negligence of Terminal Carrier—Presumption.*—Proof that, when a shipment of shoes was delivered, three pairs were missing, was prima facie evidence that the loss occurred while the shipment was in the possession of the terminal carrier.

Appeal and Error—Questions of Fact—Sufficiency of Evidence—Review.—Where, in an action against a carrier for loss of goods, there was evidence that a part of the goods were missing on delivery of the shipment to the consignee, and the terminal carrier offered evidence that the loss occurred before the goods reached its line, the trial court's determination of the sufficiency of such testimony, as against the presumption that the goods were lost on the terminal carrier's line, will not be interfered with on appeal.

Principal and Agent—Payments to Agent.—Where it was found on sufficient evidence that plaintiff's agent had no authority to settle the claim in suit at the time he received a certain sum from defendant's agent in settlement, and the check of plaintiff's agent for the amount paid in settlement sent to defendant was returned to plaintiff on the ground that defendant's agent had no authority to receive it, such payment did not constitute a settlement which would operate as a defense to the action.

Appeal from Common Pleas Circuit Court of Sumter County; John S. Wilson, Judge.

Action by R. M. Jenkins against the Atlantic Coast Line Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

P. A. Willcox, Mark Reynolds, and L. W. McLemore, for appellant.

Lee & Moise, for respondent.

GARY, A. J. An action was brought before a magistrate in Sumter county to recover \$7.10, the value of three pairs of shoes alleged to have been lost while in defendant's possession;

*See foot-note of *Colbath v. Bangor & A. R. C.* (Me.), 34 R. R. R. 488, 57 Am. & Eng. R. Cas., N. S., 488.

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and joined therewith was an action for \$50 penalty for not adjusting the claim as required by statute. On the hearing before this court, the appellant, for the first time, raised the question that the magistrate was without jurisdiction to try the action for the penalty. This question is concluded by the decision in the case of the same plaintiff against the same defendant, in the action for the statutory penalty for failure to settle the claim for the loss of 14 barrels of flour, which has just been filed (66 S. E. 409). It is not contested that the magistrate had jurisdiction in the action for damages. With respect to the exceptions to the judgment for damages appellant confines his argument to two questions:

First. It is contended that there was no evidence to show that the shoes were lost while in the possession of the defendant. There was testimony that, when the shipment was delivered, three pairs of shoes were missing. This was *prima facie* evidence that the loss occurred while the shipment was in the possession of the terminal carrier. *Charles v. Railroad*, 78 S. C. 38, 58 S. E. 927, 125 Am. St. Rep. 762. Notwithstanding the defendant offered testimony that the loss occurred before the goods reached its line, it was for the trial court to determine the credibility and sufficiency of the testimony as against the presumption, and, the magistrate and circuit court having determined the fact against appellant, this court cannot interfere.

Second. The main defense relied upon by defendant was an alleged voluntary payment as settlement of the claim for damages. There was testimony that after suit was brought defendant's agent at St. Charles called at plaintiff's store on September 13, 1907, and paid \$7.10 to an agent of plaintiff, who was authorized to collect and receipt for such claims as were not in suit. Plaintiff's agent gave a receipt for the money in settlement of the claim, but at the time neither plaintiff's agent nor defendant's agent knew that the claim was in suit. The claim was filed on February 18, 1907, and no interest and no costs were tendered or received. On October 5, 1907, two days before the trial, plaintiff's agent sent to defendant's agent his check for the amount paid, which was returned to plaintiff on the ground that the agent had no authority to receive it. Under this testimony the magistrate and circuit court have found that plaintiff's agent had no authority to settle the claim in suit. There was, therefore, no error of law in the refusal to nonsuit the plaintiff, and to give judgment in favor of defendant. The case of *Levister v. Railway*, 56 S. C. 508, 35 S. E. 207, does not apply to the facts of this case.

It is the judgment of this court that the judgment of the circuit court be affirmed.

HARTER *v.* CHARLESTON & W. C. RY. CO. *et al.*

(Supreme Court of South Carolina, March 11, 1910.)

[67 S. E. Rep. 290.]

Carriers — Freight — Loss—Actions — Sufficiency of Evidence — Amount of Claim.—In an action against a railroad company for the value of freight shipped, together with the statutory penalty for nonadjustment of the claim, evidence held to show that plaintiff's claim was filed for \$8.25.

Commerce—Regulation—Carriers.—Where it was not shown that the routing of freight shipped over several roads so as to take it out of the state for a part of the route was usual or necessary, it would be treated as an intrastate shipment, so that the agent of the terminal carrier was agent of the initial carrier for the purpose of receiving a claim for loss filed with it under Act May 13, 1903 (24 St. at Large, p. 1).

Carriers — Freight — Actions — Damages — Interest.—The statute making the carrier liable for the amount of loss or damage to freight en route, together with interest thereon from the date of filing the claim until its payment, fixes the measure of damages for loss in such case, so that the complaint in an action against the carrier therefor need not demand interest in order to recover it.

Carriers—Freight—Loss—Actions—Presumptions—Loss on Connecting Lines.*—The delivery by a terminal carrier of a part of a single shipment for the whole of which it has receipted raises a presumption that the loss of the part not delivered occurred on its line, so as to require it to show the contrary.

Appeal and Error—Findings—Conclusiveness.—The Supreme Court is bound by the trial court's findings if they are supported by any evidence.

Appeal from Common Pleas Circuit Court of Barnwell County; Robt. Aldrich, Judge.

Action by J. J. Harter against the Charleston & Western Carolina Railway Company and others. From a judgment for plaintiff against defendant the Atlantic Coast Line Railway, plaintiff and such defendant appeal. Affirmed.

P. A. Willcox, J. T. Barron, and Wyman & Wyman, for appellants.

James M. Patterson, for respondent.

JONES, C. J. This was an action before a magistrate to recover the value of a set of harness, \$8, and freight thereon paid, 25 cents, together with the statutory penalty of \$50 for failure

*See foot-note of preceding case.

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to adjust the claim within the time required by law. The judgment of the magistrate was against all the defendants for \$59, which included interest on the claim from the date of its filing January 24, 1906. The defendants appealed to the circuit court, and Judge Aldrich reversed the judgment of the magistrate as to Charleston & Western Carolina Railway Company and Columbia, Newberry & Laurens Railway, but affirmed the judgment as to the Atlantic Coast Line Railway. From the judgment the plaintiff and the defendant Atlantic Coast Line Railway both appeal.

The defendant railway contends, first, that the magistrate was without jurisdiction, as the testimony fails to show the amount of claim alleged to have been filed. The plaintiff testified: That this set of harness was bought in Bennettsville, S. C., cost \$8. There were several sets of harness in this shipment. All arrived, but one set checked short. That the bill of lading was filed with the Charleston & Western Carolina Railway Company at Fairfax, S. C., together with freight bill, invoice, and claim on January 24, 1906, and that the freight paid was 25 cents. The only reasonable inference from this testimony is that the claim was filed for \$8.25, the claim as sued for. The jurisdiction of the magistrate affirmatively appears on the record.

The next contention is that nonsuit should have been granted because the testimony showed conclusively that the only claim filed was with the agent of the Charleston & Western Carolina Railway Company, and that no claim had been filed with any agent of the appellant Atlantic Coast Line Railway Company. The record shows that the freight was shipped from Bennettsville, S. C., and bill of lading issued by the Atlantic Coast Line Railway, to its destination, Fairfax, S. C. The Atlantic Coast Line Railway alleged in its answer that the route of the shipment was from Bennettsville, S. C., over the Atlantic Coast Line Railway lines to Columbia, S. C.; from Columbia, S. C., over the Columbia Newberry & Laurens Railway Company lines to Laurens, S. C.; from Laurens, S. C., over the Charleston & Western Carolina Railway lines, via Augusta, Ga., to Fairfax, S. C., the point of destination. But there was no evidence in support of the allegation, and no showing that such was the usual or necessary routing. Hence it is proper that we should treat the shipment as intrastate. Moreover, the appellant alleged in its answer that part of the shipment of boxes of harness followed the above routing, but that one box or set of harness was lost while in the possession of the Atlantic Coast Line Railway. In such circumstances, the agent of the Charleston & Western Carolina Railway Company at Fairfax, S. C., must be regarded as the agent of the Atlantic Coast Line Rail-

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way Company, a connecting carrier, with respect to the filing of a claim for loss to such shipment, under the act of May 13, 1903, which in *Venning v. Railroad Co.*, 78 S. C. 42, 58 S. E. 983, 12 L. R. A. (N. S.) 1217, 125 Am. St. Rep. 768, was held void only so far as it applied to interstate shipments. The penalty statute (24 St. at Large, p. 1) expressly requires that the claim shall be filed at the point of destination.

It is also contended that plaintiff, not having demanded interest in his complaint, should not have been allowed to recover interest on the claim. The statute expressly provides that the carrier shall be liable for the amount of such loss or damage, together with interest thereon from the date of the filing of the claim therefor until the payment thereof. This is fixed as a measure of damages and follows on proof of the conditions upon which it depends. *Walker v. Railway*, 76 S. C. 313, 56 S. E. 952.

The plaintiff in this appeal contends that the circuit court was without jurisdiction to reverse the judgment of the magistrate against the Columbia, Newberry & Laurens Railroad because the company had not appealed from the magistrate's judgment. This is founded on a misconception. The record shows as follows: "The judgment of the magistrate was against all the defendants, from which judgment the said defendants appealed to the circuit court."

Plaintiff further excepts that there was error in reversing the judgment of the magistrate as to the Charleston & Western Carolina Railway Company (1) because there was nothing to sustain said appeal except an admission by its codefendant that the goods were lost on its line of road; (2) because the evidence showed partial delivery by the Charleston & Western Carolina Railway Company to the consignee, the acceptance of freight by it, the filing of the claim with it, and nonpayment thereof. It is true that the delivery by the terminal carrier of a part of a single shipment of goods and the receipt by it of freight for the whole shipment would raise a presumption that the loss occurred on its line, and would cast upon it the burden of showing that the loss did not occur on its line. *Charles v. Railroad Co.*, 78 S. C. 38, 58 S. E. 927, 125 Am. St. Rep. 762. But in this case the Atlantic Coast Line Railway Company admitted that the loss occurred while on its line. The circuit court having found this as a fact, and this court being bound by the findings of fact by the circuit court when there is any evidence to support it, the presumption is overcome by the fact.

The exceptions are overruled, and the judgment of the circuit court is affirmed.

ARMSTRONG, BYRD & Co. v. ILLINOIS CENT. R. Co.

(Supreme Court of Oklahoma, May 10, 1910.)

[109 Pac. Rep. 216.]

Carriers—Carriage of Goods—Action for Loss—Evidence.*—In an action against a carrier by a shipper for loss or damage to a car of organs, said shipment having been delivered to the carrier in good condition, and by it to the consignee in a damaged state, this makes prima facie case against the carrier.

Carriers—Carriage of Goods—Damage—Prima Facie Defense—Shifting of Burden of Proof.—In an action by a shipper against a carrier to recover on a shipment consisting of a car of organs damaged by a flood, when the organs were in a car on a side track in defendant's yard, such car in due course of business having been received at that point on June 4th, and on June 5th, with 74 other cars, tendered to the connecting carrier, 40 of said cars being accepted, and this car, with the balance, being declined on the ground that it was unable, on account of the flood, to handle all the business tendered it; also on June 6th and June 7th, it with other cars being tendered to such connecting carrier, and likewise refused, it was then removed to the side track in the yards where the damage occurred, the same being as reasonable a place of safety as was available at that time, the damage being admittedly occasioned by an act of God, this constituted a prima facie defense.

(a) The carrier, by proving the damage was due entirely to the flood or act of God, overcomes such prima facie case, and the burden shifts to the shipper, then, to show that negligence on the part of the carrier co-operated with the act of God in bringing about the damage to the shipment, in order to recover.

Carriers—Carriage of Goods—Damage—Negligence—Evidence.—The car of organs having been received on the morning of June 4th in regular course of business, and with 74 others, in due course of business, being tendered to the connecting carrier on June 5th, only 40 of which were accepted, the others being declined on account of the liability of such connecting carrier to handle same, that of itself, without more, is not sufficient to show negligence contributing to the loss.

(Syllabus by the Court.)

Error from District Court, Oklahoma County; George W. Clark, Judge.

*See last foot-note of *Peele & Copeland v. Atlantic C. L. R. Co.* (N. Car.), 33 R. R. R. 153, 56 Am. & Eng. R. Cas., N. S., 153; foot-note of *Terry v. Southern Ry. Co.* (S. Car.), 30 R. R. R. 534, 53 Am. & Eng. R. Cas., N. S., 534; last foot-note of *McGregor v. Oregon R. Co.* (Ore.), 28 R. R. R. 374, 51 Am. & Eng. R. Cas., N. S., 374.

Armstrong, Byrd & Co. v. Illinois Cent. R. Co

Action by Armstrong, Byrd & Co. against the Illinois Central Railroad Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Harris & Wilson, for plaintiff in error.

R. M. Campbell, for defendant in error.

WILLIAMS, J. That the defendant in error received the car of organs, assigned to an Oklahoma point, which were damaged about June 10, 1903, on account of the inundation of the east bottom of the Mississippi river opposite the city of St. Louis, resulting in the destruction of much property, and afterwards in such damaged condition reached the consignee, is not controverted. That said flood was so extensive as to comprise a superhuman agency is not disputed. It is claimed, however, that on account of the proximate negligence of the carrier it should not be excused from answering for the damages sustained. The facts in this case are practically the same as those in *Grier et al. v. St. Louis Merchants' Bridge Terminal Railway Co.*, 108 Mo. App. 565, 84 S. W. 158. That action arose out of the same flood.

In the case at bar, the car of organs reached East St. Louis over the defendant's line, which terminated at that point, on the morning of June 4, 1903. It was handled in the usual manner, and on June 5th, with 74 other cars, in due course of business, tendered to the Terminal Railway Association, its connecting carrier, which accepted 48 of them, and refused the others, including the one in question, stating that it was unable to handle all of the business on account of the flood. On the next day (June 6th) it, with 164 cars, was again tendered to the Terminal Railway Association, and was again refused on account of its tracks being under water, and not being able to handle it. On June 7th, it, with 219 other cars, was offered, but it was impossible to either exchange traffic or work construction trains on account of water having flooded the tracks of said association, etc. Thereupon, the car was taken to defendant's yards where the other cars were taken for protection from the high water, and levees were also erected by the use of dirt and sacks of sand to protect such yards. The uncontradicted evidence shows that such yards were safe and secure against any ordinary flood, or any flood which could reasonably be expected, and that the car in question among others in the possession of the defendant, on account of the congestion of the traffic resulting from the flood, could not be moved from East St. Louis, to any safer place. On June 5th, the water beginning to rise rapidly in the Mississippi bottom, and that portion of the city where the tracks of the Illinois Central Railroad Company lay appearing to be dangerous as well as all other portions of East St. Louis, it being pro-

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tected mainly by the embankments of the railroad leading into the city, the mayor of said city called a meeting of the officials of the various railroads for the purpose of taking concerted and immediate action toward saving the city from being inundated, and the request was made of all railroads to render all the aid and assistance they could, by furnishing to said municipal authorities their engines, cars and dirt, as well as all the men they could, for the purpose of bringing dirt into the city to raise the embankments and make temporary levees to keep the water out of the city. The defendant company complying with this request, as a result during such time, it could not bring any freight or passenger trains in or carry any out of said city over its tracks. Those trains only hauling dirt for embankments to protect the city were permitted by the municipal authorities to be operated. On June 5th, 1903, the mayor forbade the defendant from running any trains into or out of the city except for such purposes, this order remaining in force until June 15th. On the 9th or 10th of June, a washout occurring on the Illinois Central Railroad embankment in the southeast part of the city, after that date, it was unable to get trains of any kind or character into the city or resume operation until about the 15th of June, 1903. This flood was the most extraordinary since the year 1844.

This case, in point of fact, is fully as strong in favor of the carrier as the case of *Grier v. The St. Louis Merchants' Bridge Terminal Co.*, supra, and if the conclusion reached in that case is correct, the judgment rendered in favor of the defendant in error by the trial court should be affirmed. We are referred to the case of *A., T. & S. F. R. Co. v. Madden, Sykes & Co.*, 46 Tex. Civ. App. 597, 103 S. W. 1193, as being contrary thereto. In that case, the co-operating negligence consisted in the improper location of the carrier's yards without providing reasonable protection in the light of previous inundations. It is not in point, for the further reason that the car was on June 7th set out in the yard at a reasonable place of safety when it was ascertained that it was not reasonably practical to get the car out of the bottom.

Our attention is also called to the case of *Michaels v. N. Y. Cent. R. Co.*, 30 N. Y. 575, 86 Am. Dec. 415, in which the shipment, consisting of boxes containing dry goods, was received by the carrier at Albany to be transported to Rochester, 12 days later being delivered to the consignee in a damaged condition. When the shipment was received at Albany, instead of prompt transportation, same was held for back charges and placed in a warehouse, close to the river's (Hudson) edge, and not out of reasonable reach of rising water. Three days after being placed therein, "one of those freshets not uncommon in the upper sources and tributaries of the Hudson, and at Albany, occurred."

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The defendant took no reasonable steps to protect the boxes and their contents against the probable effects of the river's rise after it began. It could, with exercise of reasonable care, have prevented the damage. The carrier in that case was properly held not excusable from liability. Here, the inundation was appalling. Not only was the property of the carrier in greater danger, but the lives of the inhabitants of a city of great population were in peril after June 5th, the loss of damage being, without controversy, occasioned by this flood. This was a complete defense against the plaintiffs' prima facie case that the car of organs was delivered to the defendant in good condition and received by the connecting carrier from it in a damaged condition. When the loss occurs from such a cause that the law will not presume negligence or where it happens by an act of God, the burden of proving negligence and that it contributed to the loss, by the weight of authority, is upon the plaintiff. Hutchinson on Carriers (3d Ed. 1906) vol. 1, § 449, p. 480, and authorities cited in footnote 23; Id. vol. 3, § 1355, pp. 1604, 1605, 1607, and authorities cited in footnotes. See, also, Grier et al. v. St. Louis Merchants' Bridge Terminal Railway Co., supra. Unless such negligence appeared by the defendant's evidence in showing the damage to be the result of an act of God, the burden shifted to the plaintiffs, and it was incumbent upon them to show that defendant was guilty of negligence that contributed to the loss or damage, and that, but for such negligence, the loss could have, with the exercise of reasonable care, been avoided. This burden it failed to sustain. The record in this case discloses that the defendant did everything within reason to protect not only this car of organs, but all other property in its custody. Its duty was to all shippers alike. The car was handled in due course of business, and, within one day after its receipt, tendered to the connecting carrier. There is nothing to show that it could have been tendered earlier. And, if so, that it would have been accepted, only about half of the cars tendered on June 5th being received. Nor does it appear that defendant had reason to believe that the connecting carrier could or would not receive said car after June 4th. On the contrary, same was tendered to it on each of the three succeeding days. Then realizing that the connecting carrier could not handle it, it took same to the safest place available for detention, it not being reasonably practicable to get this car out of the bottom after June 4th until June 17th. See, also, C., R. I. & P. R. Co. v. Logan, Snow & Co., 105 Pac. 343; Am. Brewing Ass'n v. Talbot, 141 Mo. 674, 42 S. W. 679, 64 Am. St. Rep. 538; Bibb Broom Corn Co. v. A., T. & S. F. R. Co., 94 Minn. 269, 102 N. W. 709, 69 L. R. A. 509, 110 Am. St. Rep. 361.

The judgment of the lower court is affirmed. All the Justices concur.

ST. LOUIS, I. M. & S. RY. CO. *v.* JONES.

(Supreme Court of Arkansas, Jan. 31, 1910.)

[125 S. W. Rep. 1025.]

Carriers—Shipping Contracts.—All previous contracts for the transportation of property are merged in the contract evidenced by the bill of lading, signed by both parties.

Carriers—Contracts—Validity.*—A stipulation in a shipping contract that the shipper releases all causes of action which have accrued to him by any prior contract does not have the effect of releasing the carrier from liability for damages already accrued, unless there is a separate consideration for the release.

Carriers—Contracts—Liability.†—A carrier, though not bound to transport live stock within any specified time, nor deliver the same at destination at any particular hour, or for any particular market, must transport the stock with all convenient dispatch, and with such suitable and sufficient means as it must provide for its business.

Carriers—Contracts—Liability—Exemptions.‡—A carrier may not contract for exemption from liability for damages happening from its negligence or the negligence of its servants.

Carriers—Contracts—Liability—Exemptions.§—A stipulation in a cattle shipping contract that, in consideration of a reduced rate, voluntarily accepted by the shipper, he will assume all risk and expense of caring for the stock, and will load and unload the same at his expense, is valid, and the carrier does not become liable for the stock until they are loaded on its train.

Carriers — Contracts — Liability — Exemptions.—The Hepburn act (Act June 29, 1906, c. 3591, § 7; 34 Stat. 595 [U. S. Comp. St. Supp. 1909, p. 1166]), prohibiting a carrier by contract or regulation to exempt itself from liability for injury caused by it, its servants or connecting carriers, etc., does not prevent a carrier of cattle from one state to another to exempt itself by contract from liability until the cattle are loaded on its cars, since a carrier need not take possession of property before the same is placed on its cars for transportation.

*See generally, last foot-note of *Black v. Atlantic C. L. R. Co.* (S. Car.), 32 R. R. R. 603, 55 Am. & Eng. R. Cas., N. S., 603.

†For the authorities in this series on the question as to what delays a carrier of freight is liable for, see first foot-note of *Tiller & Smith v. Chicago, B. & Q. R. Co.* (Iowa), 33 R. R. R. 743, 56 Am. & Eng. R. Cas., N. S., 743; last foot-note of *Cormack v. New York, etc., R. Co.* (N. Y.), 33 R. R. R. 629, 56 Am. & Eng. R. Cas., N. S., 629.

‡See first foot-note of *McIntosh v. Oregon R. & N. Co.* (Idaho), 33 R. R. R. 768, 56 Am. & Eng. R. Cas., N. S., 768; first foot-note of *Wisecarver & Stone v. Chicago, etc., Ry. Co.* (Iowa), 33 R. R. R. 728, 56 Am. & Eng. R. Cas., N. S., 728.

§See first foot-note of *Chicago, etc., Ry. Co. v. Hostetter* (Ind.), 30 R. R. R. 242, 53 Am. & Eng. R. Cas., N. S., 242.

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Carriers — Contracts — Liability Exemptions.||—A cattle shipping contract, which stipulates that a shipper shall assume the risk and care of the cattle until they are loaded, does not change the duty of the carrier to furnish cars within a reasonable time after demand therefor, and it is liable for damages incurred by the shipper because of the failure to furnish cars within such reasonable time.

Damages—Reduction of Damages.||—Where a carrier was liable for losses sustained to a shipper of cattle by the escape of the cattle from pens while awaiting cars, the shipper must use all reasonable means to reduce the loss, and he could not permit the loss to increase, and hold the carrier liable for a loss which he might have prevented; and a contract having for its sole inducement the undertaking of the shipper to collect and ship all of the cattle he could find was without consideration.

Hart, J., dissenting.

Appeal from Circuit Court, Lawrence County; Charles Coffin, Judge.

Action by Charles Jones against the St. Louis, Iron Mountain & Southern Railway Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Kinsworthy & Rhoton, S. D. Campbell, and Jas. H. Stevenson, for appellant.

Smith & Blackford, for appellee.

BATTLE, J. Charles Jones inclosed about 30 head of his cattle in the stock pen of the St. Louis, Iron Mountain & Southern Railway Company at Minturn, Ark., for shipment over its railway. About the 10th day of June, 1908, the cattle escaped from the pen. After much trouble and some expense he recovered a part of them; about 11 of them he never recovered. He brought this action against the railway company to recover the losses sustained by him by reason of their escape. He alleged in his complaint as follows:

"That on or about the 10th day of June, 1908, plaintiff made arrangements with the station agent of defendant at Minturn, Ark., to set a car at the stock pen suitable to the shipping of a car load of cattle. That the defendant, by the negligence of its agents and employees in the first instance, unlawfully failed and refused to spot or locate said car within the statutory time, or at the proper place for the loading of the cattle.

"That he, depending upon the defendant to comply with its

||See generally, first foot-note of *Oliver & Son v. Chicago, etc., R. Co. (Ark.)*, 32 R. R. R. 449, 55 Am. & Eng. R. Cas., N. S., 449.

||For the authorities in this series on the subject of the duty of a person injured by the negligence of another to minimize his damages, see *White v. Chicago & N. W. Ry. Co. (Iowa)*, 34 R. R. R. 768, 57 Am. & Eng. R. Cas., N. S., 768.

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contract and the provisions of law, procured and gathered together and placed in the stock pen at said station a car load of cattle for shipment to East St. Louis, Ill., consisting of 20 short four year old steers, average weight of which was 900 pounds each, six head of cows, average weight of which was 800 pounds each, four three year old heifers, average weight, 600 pounds each, one two year old heifer, weight, 500 pounds, and one two year old steer, weight, 500 pounds.

"That by the malicious, wanton negligence of the defendant's agents and employees in not locating car at the proper place for loading and within the proper time, and by negligently failing to accept and receive for transportation of cattle, the same having remained in the stock pen for 15 hours without food or water after they had been delivered to defendant for transportation, and after the defendant, by its station agent at Minturn, had executed and delivered to plaintiff its bill of lading for same, the cattle became restless, and began to try to break out of the stock pen, and about 10 o'clock on the night of the 10th day of June, 1908, the cattle remaining in the stock pen by the negligence of the defendant as aforesaid, said cattle became frightened and stampeded, by reason of the different trains of the defendant that were passing upon the main line of its road and upon the side track at the station, breaking out of the stock pen, and scattering in every direction; some going upon the track, and being killed by the trains of the defendant; some being crippled, the number of which that were killed or crippled, the kind of trains, or the direction going, being to plaintiff unknown.

"Plaintiff states that he made an agreement with P. H. Fullenwider, purporting to be the agent of the defendant, subsequent to the time that the cattle escaped from the stock pen, as above alleged, that plaintiff should get up the 32 head of cattle he could find upon the range, and ship them to the same market and the same commission men that he had originally contemplated, and that the defendant would pay the market price for every and all of such cattle as plaintiff failed to find, and pay the plaintiff the difference he received, and those he could find and ship, and the price they were worth at the time they would have reached the market had plaintiff got proper transportation originally, and for such shrinkage as the cattle that he should find sustained by reason of delay in shipping, and to pay plaintiff a reasonable price for his trouble in locating and repenning the cattle, and for such necessary expense as he might be put to in and about the same.

"Plaintiff states that he has made diligent search to find all of the cattle, but that he is unable to find any, except nine steers, four years old, two three year old heifers, and four cows, of the original 32 head, which cattle were under the agreement shipped,

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together with other cattle of plaintiff, on the 23d day of June, 1908.

"That by reason of the defendant's negligence, plaintiff was compelled to sell the cattle upon the market for a price less than he would have received for the 15 head of cattle, on the date he would have sold them as originally contemplated, in the sum of \$51.80, and that the cattle were caused to shrink by reason of the defendant's negligence aforesaid 200 pounds, to his further damage in the sum of \$7, and that he employed help in getting up the 15 head of cattle, and expended therefor the sum of \$10, and that he was compelled to hire pasturage for the cattle during the time he was gathering same, and paid therefor the sum of \$15, and that since shipping the 15 head of cattle, he has located one of the cows, one three year old heifer, and one two year old steer, and one two year old heifer, and that plaintiff, after making diligent search for all of the cattle as aforesaid, had been unable to find 11 head of the 20 four year old steers, as aforesaid, except those that were dead or crippled by the negligence of the defendant's agents and employees, and says, as he believes and avers, that all of the 11 head of steers were either killed or entirely gone which were worth to plaintiff the market price at the time he placed same in defendant's stock pen at Minturn, which was 4½ cents per pound on foot, amounting to \$445.50, to his great damage all in the sum of \$529.30.

"Wherefore, premises considered, plaintiff prays judgment against the defendant in the sum of \$539.30, for costs and all other and proper relief."

The defendant answered and denied the allegations of the complaint, and alleged that plaintiff's damages, if any, were caused by his own negligence, and that by the terms of the bill of lading executed by it to him it was not liable for the loss sustained by the escape of the cattle from the stock pen.

The plaintiff testified in the trial of the issues as follows: Some time in June, 1908, he went to Minturn, in this state, and made arrangements with the defendant's station agent at that place to furnish him with a car for the shipment of his cattle. He collected his cattle, and drove them to Minturn and placed them in the defendant's stock pen. There were no means provided for fastening the gate of the stock pen, except a trace chain, but no lock. He purchased a lock, and fastened the gate with the chain and lock, keeping the key to the lock. On the 9th of June, 1908, the agent told him that there would be a special train at the station on the next morning about 7:40 o'clock a. m., and agent wanted him to ship his cattle on that train, but he failed to ship on that train. The agent then said that, "There will be another train here in a short time, and you can ship on that." In the meantime the agent executed to him a bill of lad-

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ing for the cattle, which he accepted. Among other things, it substantially provides as follows:

“(1) That the live stock was not to be transported within any specified time, or delivered at destination at any particular hour, nor in season for any particular market.

“(2) That the railway company is exempted from loss or damage arising out of any accident, or causes not arising out of its own negligence.

“(3) That the shipper assumes all risk and expense of feeding, watering, bedding, and otherwise caring for said stock while in the pens or elsewhere, and of loading and unloading same.

“(4) That the shipper by said contract releases and waives all cause of action for damages that may have accrued to him by any prior written or verbal contract.

“(5) That the shipper acknowledges that he has had the option to select this or the unlimited liability contract, and has taken this one because the rate is cheaper.

“(6) That no agent of the company has the right to agree to ship said live stock by any particular train, or to reach any particular market, or to furnish cars on any particular day, and that the carrier expressly declines to do this.”

About the time the bill of lading was executed the promised train passed without stopping. The agent then said, “There will be another train here about 5 or 6 o'clock of the evening of the same day, and it will stop and take your cattle.” At the designated time the train arrived, and, because his cattle were not already loaded, refused to take them, and moved on. The agent then said, “There will be another train here to-night at 11 o'clock, and it has orders to take your cattle.” It came between 11 and 12 o'clock that night, but the stock was gone. The gate to the pen was opened, and the chain with which it was fastened was broken.

He further testified that he made an agreement with P. H. Fullenwider to the effect stated in his complaint, and that he sustained damages as stated in his complaint. Other witnesses testified, but plaintiff's testimony is most favorable to him.

There was no evidence adduced to show how the cattle escaped from the pen, except through the gate. A part of the evidence tended to show that they were let out by some one. There was no complaint or evidence to show that the pen was defective.

Over the objections of the defendant the court instructed the jury as follows:

“(1) The jury is instructed that, if they believe from the preponderance of the evidence in this case that the plaintiff, Charley Jones, had an understanding with the station agent at Minturn that he desired to ship certain live stock to a foreign market,

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and it was understood between said plaintiff and said agent that a proper car for the shipment of said live stock would be spotted at the proper place for loading on the morning of the 10th day of June, 1908, and on the strength of said understanding the plaintiff gathered together a car load of live stock, had them placed in the stock pen of defendant at Minturn, Ark., and that the agent was negligent, and that said negligence concurred with the negligence of other agents of the defendant, failed and refused to properly place said car for the loading of said live stock at the time agreed upon between the parties, and that the failure on the part of the defendant's agents aforesaid the plaintiff was not permitted to load said cattle in time to be taken and transported to the market which plaintiff contemplated to place them for sale, and that said failure on the part of defendant's agents aforesaid was the direct and proximate cause of the injury complained of in plaintiff's complaint, then you are authorized to find for the plaintiff in whatever sum you find he was damaged by such failure on the part of the defendant, unless you further find that the plaintiff was negligent, and that his negligence contributed to the injury complained of.

"(2) The jury is instructed that it is the duty of the defendant, after accepting personal property for shipment, such as live stock, to transport same without delay, and that any negligence on its part, through its agents and employees in the non-performance of such duty, is chargeable to it; and if you believe by a preponderance of the evidence in this case that the agents and employees of the defendant were negligent in furnishing speedy facilities for the transportation of the cattle in question, and that such failure was the direct and proximate cause of the injury complained of in plaintiff's complaint, then you are authorized to find for the plaintiff, in such sum as the evidence warrants under the instructions of the court, taken together in this case, unless you find that plaintiff contributed to the said injury by his own negligence."

"(4) The jury is instructed that it is the duty of the defendant to provide, without delay, reasonable facilities of transportation to all shippers at any station who, in the regular and expected course of business, offer their freight for transportation; and, if you believe that the defendant was negligent in furnishing the plaintiff a car, properly placing same, in which to ship his cattle, and that such negligence was the direct and proximate cause of the injury, then you should find for the plaintiff, unless you further find that the plaintiff contributed to his injury by his own negligence.

"(5) If you find that there was an adjustment agreed upon between the plaintiff, Jones, and Fullenwider, the agent of the defendant company, agreed that the company would pay for all

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the cattle lost, and for the expense of getting up the cattle and for pasturage, you should find for the plaintiff as to all items included in such agreement, irrespective of the question of the prior negligence of the company.

The jury returned a verdict in favor of the plaintiff, and the court rendered judgment accordingly. To reserve the judgment defendant prosecutes an appeal to this court.

In the bill of lading executed by the defendant, and signed by both parties, and which is the contract of shipment entered into by them, the plaintiff released and waived all causes of action for damages, if any, that may have accrued to him by any prior written or verbal contract. All previous contracts were merged in the contract evidenced by the bill of lading. This included the agreement by the agent to furnish a car for the shipment of the cattle, made prior to the execution of the bill of lading. But the bill of lading did not have the effect to release the appellant of liability for damages already accrued: there being no separate consideration for such release. *St. Louis & San Francisco Railroad Company v. Pearce*, 82 Ark. 353, 358, 101 S. W. 760, 118 Am. St. Rep. 75.

It was also agreed that the cattle were not to be transported within any specified time, or delivered at destination at any particular hour, nor in season for any particular market. This did not, however, exempt the carrier from the consequences of its or its agent's negligence. While it was not bound, according to agreement, to transport the cattle within any specified time, or to deliver them at destination at particular time, it was its duty to transport them with all convenient dispatch, with such suitable and sufficient means as it was required to provide in its business; that is to say, in a reasonable time. *St. L., I. M. & S. Ry. Co. v. Deshong*, 63 Ark. 443, 39 S. W. 260; 2 *Hutchinson on Carriers* (3d Ed.) § 651.

From what we have said it follows that instruction numbered 1, and copied in this opinion, should not have been given.

The escape of the cattle from the stock pen of appellant was the immediate cause of the greater part of the damages suffered by appellee if not all. There was no duty of the appellant to furnish cars for their shipment after their escape, and before their recovery. Who is responsible for the escape? The contract provides: "That the second party (appellee) shall assume all risk and expense of feeding, watering, bedding, and otherwise caring for the live stock (cattle) covered by this contract while in the cars, yards, pens, or elsewhere, and shall load and unload the same at his own expense and risk." By this contract appellee assumed all care and risk for the cattle while in the pen, and appellant did not become liable for them until they were loaded on its train. Was it a valid contract? This court has repeatedly held that common carriers cannot contract for ex-

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exemption from liability from losses and damages happening from the negligence of themselves or their servants; that it is against public policy to permit them to do so. *Taylor, Cleveland & Co. v. Little Rock, Mississippi River & Texas Railroad Co.*, 32 Ark. 393, 398, 29 Am. Rep. 1; *Taylor & Co. v. Little Rock, Mississippi River & Texas Railroad Co.*, 39 Ark. 148, 156; *St. L., I. M. & S. Ry. Co. v. Lesser*, 46 Ark. 236; *Little Rock, Mississippi River & Texas Railroad Co. v. Talbot*, 47 Ark. 97, 14 S. W. 471. And yet, while so holding, it has sustained contracts similar to the one in this case as valid, when based upon a consideration as this is. *St. L. S. W. Ry. Co. v. Butler*, 82 Ark. 469, 475, 102 S. W. 378; *St. L. & S. F. R. R. Co. v. Burgin*, 83 Ark. 502, 104 S. W. 161; *St. L., I. M. & S. Ry. Co. v. Weakly*, 50 Ark. 397, 8 S. W. 134, 7 Am. St. Rep. 104; *Fordyce v. McFlynn*, 56 Ark. 424, 19 S. W. 961. Under the rulings of this court such contracts are not stipulations against the negligence of the carrier or its servants.

The contract in this case is for the shipment of cattle from this state to another, and it is said that it is in conflict with the act of Congress known as the Hepburn act (Act June 29, 1906, c. 3591, § 7, 34 Stat. 595 [U. S. Comp. St. Supp. 1909, p. 1166]). So much of that act as is applicable to this case is as follows: "That any common carrier, railroad, or transportation company receiving property for transportation from a point in one state to a point in another state shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed," etc. The act prohibits contracts, receipts, rules, or regulations by the carrier against liability for any loss, damage, or injury caused by it, its servants and agents or connecting carriers, and not against consequences of any other causes. The liability of the carrier does not begin until the property is delivered, or lawfully tendered for transportation. The carrier and shipper may stipulate as to when the property is delivered before it is placed upon the car or other conveyance for transportation. It is not necessary that the carrier take possession before it is placed upon his car or conveyance for transportation, if the shipper desires and does retain control until that time, and such contracts are not against liability for his own acts. If he is willing and does retain control, who has the right to complain or object? In such cases there is no conflict between the shipper and carrier or their rights.

In *St. Louis, Iron Mountain & Southern Railway Company*

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v. Ozier, 86 Ark. 179, 182, 110 S. W. 593 (17 L. R. A. [N. S.] 327), it is said: "The delivery or tender of freight to the carrier for shipment may be made in accordance with such arrangement between the parties—that is, the shipper and carrier's agent—as they may choose to make in regard to this mode of delivery. Says Mr. Hutchinson: 'They may make such stipulations upon the subject as they see fit; and, when such stipulations are made, they, and not the general law, are to govern.' 1 Hutchinson on Carriers, § 115. A station agent has authority to consent to such arrangements. 1 Hutchinson on Car. § 462."

According to the contract entered into by the parties to this action, the appellee assumed the risk and care of the cattle until they were located upon the car, and appellant became liable for them after they were loaded.

The contract as to the liability of the appellee for the cattle while in the pen and until loaded did not interfere with or change the duty of appellant to furnish cars for the transportation of the cattle within a reasonable time after a demand therefor, provided such reasonable time did not expire before the escape of the cattle. It would still be liable for damages incurred by appellee by reason of the failure to furnish the car within such reasonable time.

The contract with P. H. Fullenwider was without consideration, and not binding on appellant. The principal, if not the sole, inducement to enter into the contract was the undertaking of appellee to collect and ship all of the cattle he could find. If appellant was liable for the losses sustained by the escape of the cattle, it was the duty of appellee to use all reasonable means to arrest and reduce the loss. He could not stand idly by and permit the loss to increase, and then hold the appellant liable for the loss which he might have prevented. *Railway Company v. Neal*, 56 Ark. 279, 288, 19 S. W. 963; *St. L., I. M. & S. Ry. Co. v. Stroud*, 67 Ark. 112, 56 S. W. 870; *St. L., I. M. & S. Ry. Co. v. Ayres*, 67 Ark. 371, 55 S. W. 159; 13 *Cyclopedia of Law and Procedure*, pp. 71, 72, 74, 75. He is seeking compensation for doing his legal duty, which is not a sufficient consideration for the agreement with Fullenwider.

The instructions are not in accordance with the law as we find it.

The judgment is reversed, and cause remanded for a new trial.

HART, J., dissents.

MISSOURI, K. & T. RY. CO. *v.* HANCOCK.
(Supreme Court of Oklahoma, May 10, 1910.)

[109 Pac. Rep. 220.]

Carriers—Restriction of Liability—Validity of Contract.*—A special contract executed between a carrier and a shipper in consideration of a reduced freight rate, providing that, in case of total loss of any of the live stock covered by the contract, the liability of the carrier shall not exceed a maximum valuation of the live stock stipulated in the contract, is not a contract attempting to exempt the carrier from liability arising from its own negligence; and where the contract is reasonable and just, and has been fairly entered into by the shipper, the same will be upheld by the court as a proper and lawful manner of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives.

Carriers—Carriage of Stock—Care Required—Mares in Foal.—In the absence of notice or of the facts sufficient to charge the carrier with the knowledge that the animals shipped were with foal, such condition should be regarded as a hidden or concealed defect, and the carrier in handling such shipment should not be charged with a degree of care or duty greater than that ordinarily exercised in handling mares without foal.

Carriers—Claims against—Limit of Time for Suing—Validity of Contract Prior to Statehood.†—Since prior to statehood the statutes did not forbid the making of a contract prescribing a time after which a liability incurred by a common carrier should be enforced by suit, the only limitation on the validity of such a contract, when made on sufficient consideration, was that it be reasonable as to the period of time stipulated. The time stipulated in the special shipping contract involved herein, which was executed prior to statehood, to wit. 90 days, is held to be reasonable.

(Syllabus by the Court.)

Error from Craig County Court; Theo. D. B. Frear, Judge.

Action by T. J. Hancock against the Missouri, Kansas & Texas Railway Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

Clifford L. Jackson, W. R. Allen, and Fogle & Parks, for plaintiff in error.

Seymour Riddle, for defendant in error.

KANE, J. This case involves two causes of action which arose prior to statehood. The first paragraph of the petition alleges,

*See foot-note of Winslow Bros. Co. *v.* Atlantic C. L. Co. (N. Car.), 33 R. R. R. 752, 56 Am. & Eng. R. Cas., N. S., 752.

†See extensive note, 27 R. R. R. 611, 50 Am. & Eng. R. Cas., N. S., 611; foot-note of St. Louis, etc., R. Co. *v.* Pearce (Ark.), 25 R. R. R. 107, 48 Am. & Eng. R. Cas., N. S., 107.

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in substance, that said defendant, its agents and servants, so carelessly and negligently handled said stock in transportation that by and through the carelessness, negligence, and default of said defendant, its agents and servants, two of said mares were killed, two of said horses were bruised, crippled, and rendered of no value; and that four other mares were bruised, damaged, hurt, and rendered almost worthless; that each and all of said horses and mares were so injured, bruised, and killed on account of the carelessness and negligence of the defendant company in the transportation of said horses; that at the time defendant received said horses and mares for shipment he had advertised a sale of said horses and mares to take place at Welch, Okl., and had gone to great expense and trouble in advertising and making preparations for said sale, and had purchased said horses and mares on the market at Kansas City, Mo., for the purpose and with the intention of selling them at said sale; that on account of the condition of said horses and mares when they reached Welch, Okl., the plaintiff could not offer them for sale for the reason that they were bruised and jammed and crippled; that plaintiff was put to a great expense in feeding, nursing, and caring for the said horses and mares so injured, and has been at great expense in securing the services of a veterinary surgeon in the treatment of said horses and mares, and has been damaged in the sum of \$660.

The second paragraph of the petition alleges, in substance, that the company received from the plaintiff 76 head of cattle for shipment from the town of Welch, Okl., to Kansas City, Mo.; that said cattle were all in good marketable condition; that the defendant carelessly and negligently transported said cattle, in this: It delayed transportation therein unnecessarily and unreasonably, and did not deliver said cattle at Kansas City, Mo., until the 8th day of November, 1907, at 5:05 p. m., which was too late for the market on that date; that, on account of said delay in the shipment of said cattle, the plaintiff was compelled to lay out and expend the sum of \$3.60 for extra feed at Kansas City, Mo., and that said cattle on account of the delay in said shipment, as above stated, could not be sold and were not sold until the 9th day of November, 1907; that on the 9th day of November, 1907, the market price for said cattle was 15 cents per hundred less than the price for said cattle on the 8th day of November, 1907; that, if defendant had shipped and transported said cattle with reasonable diligence, said cattle would have reached Kansas City, Mo., in the morning of November 8, 1907, in time for market on that date; that, on account of the decline in said market, plaintiff suffered a loss in the sum of \$141.02; that on account of the delay in the shipment of said cattle, as herein alleged, plaintiff suffered an extra shrinkage in said cattle of 3,800 pounds, to his damage in the sum of

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\$193.80. The answer of the defendant contained a general denial, and further allegations to the effect that the defendant received from the plaintiff at its station at Kansas City, Mo., for shipment, 25 head of horses to be shipped to Welch, Okl.; that same were received and forwarded under and by virtue of the terms of a written contract, a copy of which is hereto attached, marked "Exhibit A," and made a part of this answer. And, further answering, it was alleged, in substance, that the defendant received from the plaintiff at its station at Welch, Okl., for shipment to Kansas City, Mo., a number of cattle. Defendant states that said cattle were received and forwarded under and by virtue of the terms of a written contract of shipment, a copy of which is hereto attached, marked "Exhibit B," and made a part of this answer. As the exhibits referred to were the same as certain special live stock contracts heretofore construed by this court, it will not be necessary to set them out in full. The reply of the plaintiff consisted of a general denial and special denials of the execution of the written contracts referred to in the answer. There was a verdict for the plaintiff on both causes of action, upon which judgment was duly entered, to reverse which this proceeding in error was commenced.

On the first cause of action there was evidence tending to show that some of the mares injured were with foal at the time of their shipment and aborted while in transit. Counsel for plaintiff in error contend that the railway company is not liable for the injury or death of any of the mares by reason of their pregnancy unless it had notice of or knowledge thereof, and that it was error for the court to refuse the instruction on that question requested at the trial.

The remaining contention, so far as this cause of action is concerned, is that the court should have instructed the jury that the limitation of \$100 per head for the loss of or injury to the horses upon the agreed valuation of that amount as shown by the shipping contract was binding, and that the defendant in error could not in any event recover more than that amount for any horses killed or injured. The contract involved in the case of *C., R. I. & P. Ry. Co. v. Wehrman*, 105 Pac. 328, was identical with the contract in the case at bar. Construing the valuation clause therein, this court held that: "A special contract executed between a carrier and a shipper in consideration of a reduced freight rate, providing that, in case of total loss of any of the live stock covered by the contract, the liability of the carrier shall not exceed a maximum valuation of the live stock stipulated in the contract, is not a contract attempting to exempt the carrier from liability arising from its own negligence; and, where the contract is reasonable and just, and has been fairly entered into by the shipper, the same will be upheld by the court

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as a proper and lawful manner of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives." It was further held that: "Such a contract is not in violation of section 706, Wilson's Rev. & Ann. St. 1903, forbidding a common carrier to contract to exonerate itself from liability for gross negligence." If this was the only error complained of we would follow the rule laid down in *C., R. I. & P. Ry. Co. v. Wehrman*, supra, and remand the first cause of action, with directions to the trial court to set aside the judgment and give the plaintiff an opportunity to file a remittitur, but we are of the opinion that the defendant was entitled to an instruction covering the first point raised. Counsel for defendant in error seems to concede this, but insists that the instruction asked did not state the law correctly. This, to our mind, is not a sufficient justification for refusing an instruction on that question. In *Missouri Pac. Ry. Co. v. Fagan et al.* (Tex. Civ. App.) 27 S. W. 887, Mr. Chief Justice Fisher, after quoting several instructions requested by the defendant upon the duty which a carrier owes to animals in foal, says: "The charge first quoted in the language in which it was asked is subject to criticism; but the principle it presents is a part of the law of the case, and should have been given to the jury. It was sufficient to call the trial court's attention to the question presented, and, being sufficient for this purpose, the court should have so framed and given a charge presenting in a legal way that issue to the jury. The degree of duty and care charged to the appellant in safely transporting and handling the shipment is to some extent measurable by the character of the property shipped and its condition at the time. If the mares shipped were with foal, and this fact was not known to the carrier, and it could not have been ascertained or discovered by the exercise of reasonable diligence at the time of the contract of shipment, or before they received the injuries complained of, and such condition would, in order to preserve the stock from injury, require of the carrier a degree of caution and care greater than ordinarily exercised in the shipment of horses or mares not with foal, the carrier should not, under such circumstances, be held liable for depreciation in value of the animals that resulted from the loss of the foal. In the absence of notice or of facts sufficient to charge the carrier with the knowledge that the animals shipped were with foal, such condition should be regarded as a hidden or concealed defect, and the carrier in handling such shipment should not be charged with a degree of care or duty greater than that ordinarily exercised in handling mares without foal." See, also, on the same subject, 4 Elliott on Railroads (2d Ed.) par. 1549-A.

On the second cause of action, counsel for plaintiff in error insists that the suit for damages to the cattle was not brought within 90 days from the happening of the alleged injury, and should therefore have been dismissed, because it is stipulated in

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the contract of shipment that the shipper's failure to bring suit within that period shall bar his right to recover. On this point the evidence shows that the shipment of cattle moved on the 7th day of November, 1907, and that this action was commenced on the 7th day of March, 1908, a period of four months having elapsed. Whilst the execution of the contract was put in issue by the pleadings, we think that the evidence clearly establishes its execution by the railway company and Mr. A. A. Coutney, the agent of said shipper. Counsel for defendant in error does not seriously contend otherwise, but argues in his brief: "The defendant in error believes that all these provisions are unreasonable and void. That a common carrier can impose no such restrictions, rules, or regulations upon a shipper and that statutes as to limitations cannot be changed in any such manner nor for any such purpose." The validity of these contracts has been upheld by this court in a good many cases. *St. L. & S. F. R. R. Co. v. Phillips*, 17 Okl. 264, 87 Pac. 470; *St. L. & S. F. R. R. Co. v. Copeland*, 102 Pac. 104; *Patterson v. M., K. & T. Ry. Co.*, 104 Pac. 31; *M., K. & T. Ry. Co. v. Davis*, 104 Pac. 34; *St. L. & S. F. R. R. Co. v. Cake*, 105 Pac. 322; *C., R. I. & P. Ry. Co. v. Wehrman*, 105 Pac. 328. In *M., K. & T. Ry. Co. v. Davis*, supra, the second paragraph of the syllabus reads as follows: "The contract provides that no suit shall be brought against the carrier after the lapse of 90 days after the happening of the injuries complained of, and further provides that no agent of the carrier shall have any authority to modify, waive, or amend any of the provisions of the contract. The station agent at the destination of the mules, who was not shown to have any authority to adjust and settle claims for damages, and who did not represent that he had such authority, was without power to waive the provision of the contract requiring suit to be brought within 90 days by advising the shipper not to sue, that the company always preferred to settle that class of claims." See, also, *G., C. & S. F. Ry. Co. v. Trawick*, 68 Tex. 314, 4 S. W. 567, 2 Am. St. Rep. 494, wherein it is held: "Since the statutes do not forbid the making of a contract prescribing a time after which a fixed liability incurred by a common carrier shall not be enforced by suit, the only limitation on the validity of such a contract, when made on sufficient consideration, is that it be reasonable as to the period of time stipulated." In the other cases above referred to other clauses of identical stock shipping contracts were under discussion, and in all of them the validity of such clauses was upheld. As the second cause of action was not commenced within the time limit by the contract, it must also be reversed.

It is therefore ordered that this case be reversed and remanded, with directions to grant a new trial.

DUNN, C. J., and WILLIAMS, HAYES, and TURNER, JJ., concur.

DODGE v. CHICAGO, ST. P., M. & O. Ry. Co.

(Supreme Court of Minnesota, May 20, 1910. On Rehearing, June 10, 1910.)

[126 N. W. Rep. 627.]

Carriers—Shipment of Goods—Limiting Liability.*—Action to recover damages to live stock alleged to have been sustained by the unreasonable delay in its shipment. Held that, the obligation of a carrier to carry goods beyond the terminus of his own line being a matter of contract, not of legal duty, he may, if he contracts for through transportation, by the contract limit his responsibility to his own line, for such a limitation does not relieve him from his common-law liability safely to carry and deliver to the connecting carrier; and, further, that no errors were made by the trial court of which the appellant can complain.

On Rehearing.

Commerce—Limitation of Liability—Interstate Commerce.—The rule stated in the original opinion as to the validity of a stipulation limiting the liability of carrier to its own line has no application to interstate shipments.

Commerce—Interstate Commerce—Limitation of Liability.—The provision of Act June 29, 1906, c. 3591, § 7, 34 Stat. 593 (U. S. Comp. St. Supp. 1909, p. 1166), making the initial carrier liable for injury to an interstate shipment caused by it, or any connecting carrier, and providing that no contract shall exempt it from such liability, is constitutional.

(Syllabus by the Court.)

Appeal from District Court, Watonwan County; A. R. Pfau, Sr., Judge.

Action by George W. Dodge against the Chicago, St. Paul, Minneapolis & Omaha Railway Company. Verdict for plaintiff for less than the amount claimed. From an order denying a new trial, he appeals; and from an order denying a motion for judgment notwithstanding the verdict, or for a new trial, defendant appeals. Order affirmed, and appeal of defendant dismissed on his own motion.

J. E. Haycraft, for appellant.

James B. Sheean, for respondent.

START, C. J. This cause was brought in the district court of the county of Watonwan to recover upon four alleged causes of

*See foot-note of *Brunk v. Ohio & K. Ry. Co. (Ky.)*, 29 R. R. R. 279, 52 Am. & Eng. R. Cas., N. S., 279; foot-note of *Moody v. Southern Ry. Co. (S. Car.)*, 28 R. R. R. 706, 51 Am. & Eng. R. Cas., N. S., 706; *Roy v. Chesapeake & O. Ry. Co. (W. Va.)*, 26 R. R. R. 230, 49 Am. & Eng. R. Cas., N. S., 230.

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action, namely: (1) For damages sustained by plaintiff in July, 1907, by reason of the defendant's delay in transporting two car loads of hogs, and for the death of seven of them while in transit. (2) For damages sustained in February, 1908, by the defendant's delay in transporting two car loads of cattle for the plaintiff. (3) For damages sustained in March, 1908, by the defendant's delay in transporting a car load of hogs for the plaintiff. (4) For damages in the sum of \$15 for one calf, received by the defendant from the plaintiff for transportation, which it never redelivered to him.

The several alleged causes of action were put in issue by the answer. The action was tried to a jury. The trial judge refused to submit the first and fourth causes of action to the jury, on the ground that the evidence was not sufficient to justify the jury in finding for the plaintiff as to either. The second and third causes were submitted to the jury. Verdict for the plaintiff for \$160.01. The plaintiff appealed from an order denying his motion for a new trial, and the defendant from an order denying its motion for judgment notwithstanding the verdict or for a new trial, but it dismissed its appeal on the hearing in this court. No error is assigned by the plaintiff as to the action of the court in refusing to submit to the jury the fourth cause of action.

1. The first assignment of error to be considered is, in effect, that the court erred in denying plaintiff's request to submit the first cause of action, as requested, to the jury. It appears from the undisputed evidence that the delay in this shipment was due solely to an unprecedented storm, and that the defendant was free from any negligence as to such delay. This the plaintiff concedes; but it claims that there was evidence tending to show that seven of the hogs were not delivered to the consignee, but that they died while in defendant's possession. The complaint alleged, as to this shipment of hogs, that by reason of delay in their transportation they shrunk several thousand pounds in weight, and that seven of them were not delivered at all. If the delay in their transportation was the cause of the nondelivery of the seven hogs, as the complaint alleges, then, inasmuch as the defendant was not responsible for the delay, it would seem to follow that it was not liable in any amount on the first cause of action. But, this aside, the undisputed evidence is to the effect that the defendant exercised due care in feeding, watering, and caring for the hogs while they were in its possession. Upon the pleading and the undisputed evidence we hold that the trial court did not err in refusing plaintiff's request to submit the first cause of action to the jury.

2. The plaintiff, in support of his second and third causes of action, introduced evidence tending to show that there was an unreasonable delay in transporting the stock by a connecting line and a material shrinkage in the weight of the stock by reason

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thereof. The trial court instructed the jury, in effect, that they should deduct from the actual shrinkage in the weight of the stock shown by the evidence such loss in weight as naturally resulted from the shipment. There was no evidence received or offered tending to show that in this particular case there would have been a loss in weight of the stock, if there had been no unreasonable delay in the transportation, or any facts from which the jury might fairly make a finding as to the extent of such natural shrinkage, if any there were. The giving of this instruction is urged as error. It may be conceded that it was incorrect. Nevertheless it is clear, from a consideration of the record, that it was not reversible error; for it conclusively appears therefrom that there was no unreasonable delay in the shipment on the defendant's line. It was stipulated on the trial as to each alleged cause of action that the stock was received by the defendant at Madelia, on its line, and transported without unreasonable delay and delivered at Mankato to the connecting carrier, the Chicago & North Western Railway Company. The contract of shipment was for through transportation from a point on the defendant's line to the point of destination, Chicago, on the connecting carrier's line. If this were all of the contract, the defendant would be liable for the default of the connecting line; but the contract for through transportation expressly provided that the defendant should not be liable for any loss occurring after the stock should be delivered to the connecting carrier.

The pivotal question, then, is the validity of this limitation: for, if valid, the plaintiff was not entitled to recover on either of the causes of action. A railroad company, receiving goods to be transported over its own and other connecting lines, is not responsible for the default of other carriers beyond the terminus of its own line, unless it has contracted to transport and deliver them at a destination beyond its own line. In the absence of such a contract it is the duty of the carrier, receiving the goods for carriage over several connecting lines, safely to carry them to the end of its line and there deliver them to the next carrier. This is the carrier's common-law duty, and any contract attempting to exonerate himself from liability for loss or injury to the goods by reason of his or his agent's negligence is contrary to public policy and void. The obligation of the carrier to carry goods beyond the terminus of his own line being a matter of contract, and not of legal duty, he may, if he contracts for through transportation, by the contract limit his responsibility to his own line; for such a limitation does not relieve him from his common-law liability safely to carry and deliver to the connecting carrier. 1 Hutchinson on Carriers, § 233; 4 Ellicott on Railroads, § 1438; Shriver v. Railway Co., 24 Minn. 506, 31 Am. Rep. 353; Ortt v. Railway Co., 36 Minn. 396, 31 N. W. 519; Wehmann v. Railway Co., 58 Minn., 22, 59 N. W. 546; Myrick v. Railway Co., 107 U.

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S. 102, 1 Sup. Ct. 425, 27 L. Ed. 325; C. & N. W. Ry. Co. v. Calumet Stock Farm, 88 Am. St. Rep. 101, notes.

It appearing from the record that there was no unreasonable delay in the shipment over its own line, and the contract limiting its liability to that imposed by the common law being valid, it follows that the plaintiff was not prejudiced by the instruction complained of.

Order affirmed.

On Rehearing.

On the original hearing of this appeal the defendant asserted the validity of the clause in the contract of shipment limiting its liability to its own line, and the plaintiff denied it. Neither party referred to or made any claim under the "Hepburn Law" (Act June 29, 1906, c. 3591, § 7, 34 Stat. 593 [U. S. Comp. St. Supp. 1909, p. 1166]), which provides: "That any common carrier, railroad or transportation company, receiving property for transportation from a point in one state to a point in another state shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage or injury to such property caused by it or by any common carrier, railroad or transportation company to which such property may be delivered or over whose line or lines such property may pass. And no contract, receipt, rule or regulation shall exempt such common carrier, railroad or transportation company from the liability hereby imposed, provided that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law."

The validity and effect of the contract limiting the defendant's liability to its own line was accordingly determined without reference to the statute we have quoted. A reargument for this reason was granted, on application of the plaintiff. While the contract in question is valid at common law and is not forbidden by our own statute (Rev. Laws, 1905, § 2008), which provides that the liability of common carriers at common law shall not be limited by contract, yet the shipment in this case was interstate, and the question of the validity of the contract must be determined with reference to the federal statute. It is urged by the defendant that this statute is unconstitutional, for the reason that it imposes upon the initial carrier a liability for the default of the connecting carrier, which does not exist at common law. This statute does not impose upon the initial carrier the duty of receiving interstate shipments for through transportation by it; but, if such shipments are received for through transportation and delivery beyond its line by it, the statute forbids any stipulation for exemption from liability for loss due to the default of its agents, the connecting carriers. We are of the opinion that the statute in question is a wise and just regulation of interstate commerce,

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and therefore constitutional. *Riverside Mills v. Railway Co.* (C. C.) 168 Fed. 987; *Holland v. Railway Co.*, 139 Mo. App. 702, 123 S. W. 987.

It follows that the stipulation by the defendant, limiting its liability to its own line, is void, and that the question whether the trial court erred in its instructions to the jury must be determined without reference to such stipulation. We hold, for reasons stated in the original opinion, that the trial court rightly refused to submit the plaintiff's first alleged cause of action to the jury. We are, however, of the opinion that the trial court erred in instructing the jury, as to plaintiff's first and second alleged causes of action, that they should deduct from the actual shrinkage in the weight of the stock such loss in weight as naturally resulted from the shipment, for the reason that there was no evidence which could be made the basis of any such deduction.

Order reversed as to the second and third causes of action, and a new trial granted as to them.

SOUTHERN RY. CO. v. W. T. ADAMS MACH. CO.

(Supreme Court of Alabama, Feb. 3, 1910.)

[51 So. Rep. 779.]

Pleading—Amendment of Complaint—Different Cause of Action.—The original complaint followed the form laid down in Code 1896, § 3352 (Code 1907, § 5382), for an action against a common carrier on a contract of shipment, and an amendment was made by the addition of a count in which plaintiff claimed damages for failure to deliver, in that defendant received a lot of machinery belonging to plaintiff which it agreed for reward to deliver at a certain point to plaintiff's order, and to notify certain persons named, and averred that some days after the shipment it reached that point, and was held in defendant's possession, and thereafter and before it was burned plaintiff inquired of defendant as to whether it had arrived, and was informed it had not, and, before its burning, made further inquiries as to its arrival, and was each time advised it had not arrived, and though plaintiff thus undertook to get information as to its whereabouts, it was unable to do so, and defendants held possession till it was burned and wholly lost, to plaintiff's damage. Held, that the first count stated a cause of action *ex contractu*, but the gravamen of the count added by the amendment was the wrong committed in misinforming plaintiff as to the arrival of the machinery, thereby preventing it from applying for and receiving it, and was therefore *ex delicto*, and was a departure from the cause of action originally stated.

Action—Joinder of Causes—Contract and Tort.—Allowance of the

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amendment, being in a cause tried before the adoption of the Code of 1907, when actions *ex contractu* and *ex delicto* could not be joined, was error.

Pleading—Amendment—Departure from Complaint.—Where a count added by amendment was a departure from the original complaint, a demurrer thereto should have been sustained.

Pleading—Construction against Pleader.—A pleading will be construed most strongly against the pleader on objection thereto.

Carriers—Carriers of Goods—Responsibility by Warehouseman.*—A carrier's responsibility as a warehouseman having attached, it is still liable for giving incorrect information misleading the consignee so as to prevent removal before the goods are lost, though the loss is not imputable to any other or different negligence.

Carriers—Loss of Freight—Notice of Arrival.†—Code 1896, § 4224, provides that a common carrier, if the destination of freight is a city or town having 2,000 or more inhabitants and a daily mail, is not relieved from responsibility as a carrier by a deposit or storage of freight, unless within 24 hours after his arrival notice is given the consignee personally or through the mail. Compliance with the statute is not shown where one alleged notice was mailed "within a day or two" after arrival of the goods, and another notice was mailed 18 days after and only two days before the goods were burned.

Carriers—Delivery of Goods—Removal by Consignee—Reasonable Time.‡—Eighteen days between the mailing of notice of the arrival of goods at their destination and their destruction by fire is more than a reasonable time for their removal by the consignee.

Carriers—Delivery of Goods—Removal by Consignee—Notice of Arrival.—If a consignee had actual notice of the arrival of freight and its readiness for delivery, and did not demand it in a reasonable time thereafter, the manner of notice is immaterial.

Carriers—Delivery of Goods—Removal by Consignee—Notice of Arrival.—Where a carrier complies with Code 1896, § 4224, requiring notice of the arrival of freight to be mailed to a consignee within 24 hours to terminate liability as a common carrier, the mailing of the notice, postage paid, is notice to the consignee, but, where it does not comply therewith, the fact that notice is mailed is only rebuttable evidence of its receipt.

*For the authorities in this series on the subject of the duties and liabilities of carriers as warehousemen, see second foot-note of *Lewis v. Louisville & N. R. Co. (Ky.)*, 33 R. R. R. 134, 56 Am. & Eng. R. Cas., N. S., 134.

†For the authorities in this series on the question whether it is the carrier's duty to give notice of the arrival of freight at its destination, see last foot-note of *Illinois Cent. R. Co. v. Hopkinsville Canning Co. (Ky.)*, 32 R. R. R. 263, 55 Am. & Eng. R. Cas., N. S., 263.

‡For the authorities in this series on the question, what is reasonable time within which to remove freight after its arrival at destination, see last foot-note of *Lewis v. Louisville & N. R. Co. (Ky.)*, 33 R. R. R. 134, 56 Am. & Eng. R. Cas., N. S., 134.

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Pleading—Replication—Departure.—Where the complaint in an action against a carrier for loss of goods stated a cause of action on contract, a special replication based on failure to give notice of arrival, whereby the goods were not removed by the consignee and were destroyed by fire, is *ex delicto* and a departure.

Carriers—Shipment of Goods—Bill of Lading—Limitation of Liability—Notice of Arrival.—What notice a shipper or consignee should have as to the arrival of goods at destination is a matter as to which parties to the bill of lading may contract at their pleasure.

Carriers—Action for Loss of Freight—Evidence—Sufficiency.—Evidence in an action against a carrier for loss of freight by fire held insufficient to sustain a recovery on the first count of the complaint based on its common-law liability as an insurer under its contract.

Trial—Questions for Jury—Conflicting Evidence.—A palpable conflict in the evidence as to a fact in issue presents a question for the jury.

Principal and Agent—Agency to Receive Notice—Creation in Contract of Carriage.—A contract by which a carrier agrees to deliver freight at a particular place to the shipper's order, and to notify third persons at its destination of its arrival, made the latter the agents of the shipper to receive notice.

Carriers—Actions for Loss of Freight—Questions for Jury.—An agent for a shipper of goods, making inquiry over the telephone as to the arrival of goods, directed what other persons should say while he stood at their elbow, and an operator at a telephone connection repeated the inquiry to the carrier's agent. Held, that the reliability and accuracy of the means of communication was for the jury in an action for loss of the goods, and that it was for them to say, also, whether the message which finally reached defendant fairly apprised it of the fact that plaintiff was inquiring for the particular goods in question.

Principal and Agent—Agency in Use of Telephone—Instrumentalities.—The persons who spoke for the agent and such operator were mere instrumentalities or parts of the telephone connection between him and the carrier.

Carriers—Applying for and Removing Freight—Reasonable Time.—Computation of the reasonable time in which a consignee may apply for and remove freight begins when it is at the place and ready for delivery in the manner usual or adopted by the parties.

Carriers—Action for Loss of Freight—Questions for Jury.—In an action for loss of freight, computation of the reasonable time in which the consignee might have applied for and removed it was a question for the jury.

Carriers—Actions for Loss of Freight—Instruction.—In an action for loss of freight destroyed by fire at its destination, a charge as to defendant's common-law liability as an insurer, which pretermitted all inquiry whether the goods were ready for delivery, was properly refused.

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Carriers—Action for Loss of Freight—Amount of Recovery.—By the terms of a sale of machinery, \$400 of the price was to be paid on delivery, and of this the buyers had paid \$100, and the seller had it consigned to its own order, and drew on the buyers, bill of lading attached, for \$300. Held, that the seller under these conditions could sue the carrier in case of its loss for its full value, and recovery could not be reduced by the amount paid on account for which it was bound to account to the buyers.

Trial—Abstract Instruction.—There was no error in refusing an abstract instruction on a fact not pleaded nor supported by evidence.

Appeal from Circuit Court, Colbert County; C. P. Almon, Judge.

Action by the W. T. Adams Machine Company against the Southern Railway Company for loss of goods by fire. From a judgment for plaintiff, defendant appeals. Reversed.

The complaint is in the following form: (1) "Plaintiff claims of the defendant \$750 damages for the failure to deliver certain goods, consisting of the following machinery: [Here follows detailed description of same]—received by the defendant as a common carrier to be delivered to plaintiff at Florence, Alabama, for a reward, which it failed to deliver." (6) "Plaintiff claims of the defendant the sum of \$750 as damages, for that, whereas, on the 29th day of March, 1906, defendant received as a common carrier from the plaintiff, at Corinth, Miss., a lot of machinery, to wit. [Here follows a detailed description of the machinery]—the property of the plaintiff, of the value of \$750, which it agreed for reward to deliver in Florence, Alabama, to plaintiff's order, and to notify Green & Jenkins, of Florence, Alabama. Plaintiff avers that some few days after the shipment of said machinery it reached Florence, Ala., and was held in defendant's possession. And plaintiff alleges that after the said machinery reached Florence, Ala., and before it had been burned, plaintiff, through Green & Jenkins, inquired of defendant's agents at Florence, Ala., whether said machinery had arrived, and was informed by said agent that it had not. And plaintiff avers that, prior to the burning of said machinery it made further inquiries as to the arrival of the said machinery of the defendant's agents at Florence, Ala., and was each time notified that the machinery had not arrived. And plaintiff avers that, although it undertook in the manner aforesaid to get information of the whereabouts of said machinery after its arrival in Florence, Ala., it was unable to do so, and the defendant held possession of the same until it was burned, and wholly lost to plaintiff's damage as aforesaid."

The demurrers take the point, first, that there was a misjoinder, and that it does not appear that said inquiries were made after said machinery had reached Florence, and before a reasonable time had elapsed for the consignee to remove same, and that

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it appears that defendant's liability as a carrier had terminated at the time said inquiries were made, but does not appear that there was any breach of its duty as a warehouseman, and that it does not appear that the fire occurred by reason of defendant's negligence.

The following pleas were filed by the defendant: (3) "The contract sued on was made in the state of Mississippi for the carriage of said machinery to Florence, in the state of Alabama. Said machinery was carried by defendant to Florence, Ala., as required by said contract, and the car containing it was placed on defendant's track at or near defendant's said depot at Florence, on or about the 31st day of March, 1906, and a notice of its arrival was given to Green & Jenkins, by depositing a notice to that effect with postage prepaid in the post office at Florence, Ala., addressed to Green & Jenkins, at Florence, Ala., which was the address of the said Green & Jenkins, as shown by the contract of affreightment. Said notice was so mailed within a day or two after the arrival of said goods at Florence. Said Green & Jenkins did not call for said machinery, although it remained in said depot or warehouse until it was destroyed by fire on or about April 20, 1906, without fault on defendant's part. And the defendant further avers that the plaintiff did not call for the said machinery prior to said fire on April 20, 1906." Plea 4 is the same as 3, except that it alleges that notice was mailed on April 18, 1906, instead of a day or two after the arrival of the goods. (5) "The contract sued on is made in the state of Mississippi, for the transportation of the said machinery to Florence, Ala., said machinery was duly carried by defendant to Florence, Ala., as required by said contract, and the car containing said machinery was placed on defendant's track at or near the depot or warehouse at Florence, Ala., on or about the 31st day of March 1906, and the plaintiff on March 30, 1906, notified said Green & Jenkins, at Arthur, Ala., that said machinery had been shipped to Florence, Ala., and plaintiff had drawn on said Green & Jenkins for \$300, balance of cash payment on same. Said Green & Jenkins did not call for said machinery until after it was destroyed by fire, on or about April 20, 1906, and such fire occurred without fault or want of reasonable care on the part of the defendant. And defendant further avers that plaintiff did not call for the said machinery at Florence, Ala., prior to said fire on April 20, 1906."

The following charges were refused to the defendant: (8) "There is no evidence in this case that Green & Jenkins were the agents of defendant." (9) "Under the evidence in this case, the defendant cannot be held liable as a warehouseman." (10) "I charge you that neither Mrs. Moore, nor Mr. Beaton, nor Mr. Kyser was the agent of plaintiff in making inquiry for said machinery, under the evidence in this case." (5) "If you believe,

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from the evidence, that the machinery had been safely carried to Florence, and remained there in the car in which they were shipped on defendant's track, at or near the depot of defendant, until it was destroyed by fire on April 20, 1906, and that within three or four days after the arrival of said machinery at Florence the defendant's agents or employees mailed a postal card addressed to Green & Jenkins, at Florence, Ala., notifying them of the arrival of said machinery, I charge you that the defendant would not be liable under the first count of the complaint." (6) "If you believe, from the evidence, that the machinery arrived in Florence on March 31, 1906, and that within three or four days thereafter defendant's agent or employee mailed a postal card notice, addressed to Green & Jenkins, at Florence, Ala., notifying them of the arrival of said machinery, and the machinery remained there until it was destroyed by fire on April 20, 1906, then the defendant would not be liable as a common carrier." (A) "If you believe, from the evidence, that plaintiff, the W. T. Adams Machine Company, did not use reasonable care and diligence to prevent the loss of said machinery, and allowed it to remain at Florence, Ala., for 20 days after its arrival there, and if you further believe, from the evidence, that said fire was not caused by the defendant's negligence, your verdict must be for the defendant." (7) "If you believe the evidence, and that plaintiff is entitled to recover, it cannot recover more than \$600, with interest thereon from March 31, 1906."

Paul Spcake and Almon & Andrews, for appellant.
Kirk, Carmichael & Rather, for appellee.

SAYRE, J. There was objection to the amendment made by the addition of count 6 on the ground that it was a departure from the cause of action stated in the original complaint and operated a misjoinder of counts. Count 1, which constituted the complaint at the time of the filing of the amendment, followed the form laid down in section 5382 of the Code—then section 3352 of the Code of 1896—for an action against a common carrier on a contract of carriage, and stated a cause of action *ex contractu*. *Tallassee Falls Co. v. Western Railway*, 117 Ala. 520, 23 South. 139, 67 Am. St. Rep. 179; *N. C. & St. L. Ry. Co. v. Parker*, 123 Ala. 683, 27 South. 323; *L. & N. v. Landers*, 135 Ala. 504, 33 South. 482. Not so the amendatory count. Though not expressed with great clearness, the meaning of this count is that the defendant as a common carrier received and agreed for a reward to deliver at Florence to plaintiff's order certain machinery; that the machinery was carried to its destination in accordance with the contract of affreightment, but that plaintiff failed to receive it as he would otherwise have done before the time of its destruction by fire for the reason that he was misin-

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formed by the defendant as to the fact of its arrival. The count does not disclose the lapse of time between the arrival of the goods at their destination and their destruction. Construing the count most strongly against the pleader, we must assume that a reasonable time in which the plaintiff might have had delivery made to him had elapsed, and that the defendant was free of fault except in the particular alleged. There is no averment that the fire was due to any negligence of the defendant, but the statement is in effect that plaintiff's loss was caused by defendant's breach of a duty arising by implication of law out of the relation of bailor and warehouseman, which under the law grew up between the parties—its duty to inform the plaintiff at any time, on his application, that his goods had arrived and were ready for delivery. The duty of the defendant as a carrier having terminated, and its responsibility as a warehouseman having attached, the defendant was still liable for the wrongful acts of its employees acting within the scope of their employment. Thus, it has been held, that where goods are carried to their destination and notice given, the carrier is, nevertheless, responsible for the loss of the goods if its employees subsequently give incorrect information to the consignee which so misleads him as to prevent him from removing the goods, although the loss is not imputable to any other or different negligence on the part of the carrier. *Butler v. E. T. V. & G. R. R. Co.*, 8 Lea (Tenn.) 32; *E. T. V. & G. R. R. Co. v. Kelly*, 91 Tenn., 699, 20 S. W. 312, 17 L. R. A. 691, 30 Am. St. Rep. 902; *Berry v. W. Va. R. R. Co.*, 44 W. Va. 538, 30 S. E. 143, 67 Am. St. Rep. 781; *Jeffersonville, etc., R. R. Co. v. Cotton*, 29 Ind. 498, 95 Am. Dec. 656; *Burlington, etc., R. R. Co. v. Arms*, 15 Neb. 69, 17 N. W. 351; *Faulkner v. Hart*, 82 N. Y. 413, 37 Am. Rep. 574; *R. & D. R. R. Co. v. Benson*, 86 Ga. 203, 12 S. E. 357, 22 Am. St. Rep. 446; 4 *Elliott on Railroads*, § 1463. The gravamen of count 6 is the wrong committed by the defendant in misinforming the plaintiff as to the arrival of the freight when it applied for information on the several occasions alleged, thereby preventing plaintiff from applying for and receiving the freight. Such is the cause of action alleged in count 6. The count is *ex delicto*. *Western Union v. Krichbaum*, 132 Ala. 535, 31 South. 607. There is a clear distinction between this case and the case of *Western Railway v. Hart*, 49 South. 371. In that case the averment was that "the defendant undertook as a warehouseman for a reward, and for the benefit of the plaintiff." This cause having been tried at a time when actions *ex contractu* and *ex delicto* could not be joined, there was error in allowing the amendment. This has been the rule obtaining uninterruptedly in this state from the beginning down to the day when the Code of 1907 went into effect, was the rule when this cause was tried, and, in the exercise of a jurisdiction strictly appellate, we are constrained to fol-

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low it on this occasion. The view which we have taken of count 6, in connection with the consideration that under the circumstances there detailed it was negligence per se for the defendant to give the plaintiff incorrect information as to the arrival of the goods at destination, will dispose of the demurrer which was directed specifically to that count. As for any ground stated against the count standing alone, the demurrer was properly overruled.

Plea 3 sought to exonerate defendant by showing that the goods had been carried according to contract to Florence in this state, their agreed destination, and the car containing them placed on the defendant's track at or near its depot; that notice of their arrival was given through the post office; and that they were destroyed by fire about 20 days later without fault imputable to the defendant. We need to consider only the defect pointed out by the demurrer filed. The effort of the plea is to relieve defendant of responsibility by showing a compliance with section 4224 of the Code of 1896, and the subsequent destruction of the goods without negligence imputable to the defendant. As setting up a compliance with the statute, the plea was defective because it failed to allege that the notice was mailed within 24 hours after the arrival of the freight at its place of consignment as the statute plainly requires. The plea alleges that notice was mailed within a day or two after the arrival of the goods at Florence in this state, and their destruction without defendant's fault 20 days later. More than a reasonable time for the removal of the goods elapsed between the mailing of the notice and the destruction of the goods. *Columbus & Western v. Ludden & Bates*, 89 Ala. 612, 7 South. 471. And if the consignee had notice in fact at any time of the arrival of the freight and its readiness for delivery, and thereafter a reasonable time expired without a demand for the goods, the manner of the notice was immaterial, and a plea stating these facts would constitute a valid defense. *Fenner v. B. & S. L. R. R. Co.*, 44 N. Y. 505, 4 Am. Rep. 709; *Normile v. N. Pac. R. R.*, 36 Wash. 21, 77 Pac. 1087, 67 L. R. A. 271. But there is no allegation of notice in fact, but only of facts from which the jury might infer notice. When the statute is complied with, the mailing of notice, postage paid, is notice to the consignee. Such is the effect of the statute. But where there is no compliance with the statute, the fact that notice is mailed is nothing more than rebuttable evidence of its receipt by the consignee; and a plea setting forth only such evidence, fails to show notice in fact. As an answer to count 1, which set up liability as an insurer, the plea failed to show that defendant's liability of that character had terminated, as it attempted to do. Treating now the complaint as properly containing both counts 1 and 6, what we said of count 6 while considering the demurrer to the complaint for misjoinder of counts will sufficiently disclose our reasons for holding the plea bad as an answer to that count. As

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affecting the facts there alleged, notice was immaterial. The plea contains no denial of the facts upon which that count predicates liability.

Plea 4 is no better than plea 3. Its only difference from 3 is that it alleges that notice was mailed on a date 18 days after the arrival of the goods and only 2 days before the goods were burned, instead of "within a day or two after the arrival of said goods at Florence" as plea 3 averred.

Plea 5 alleges that plaintiff in advance of shipment notified Green & Jenkins that the machinery had been shipped, but that the persons named did not call for it until after it had been destroyed by fire without fault on the part of defendant about 20 days later. The plea was demurrable because the notice alleged was not notice that the machinery had arrived and was ready for delivery, but only that it had been shipped, meaning, as we must construe it against the pleader, that plaintiff had delivered it to the carrier for shipment. That of course was not the notice contemplated by the law which has to do with relieving the carrier of its responsibility as an insurer while preserving its responsibility as a warehouseman. If the plea was intended to assert defendant's absolution under the law applicable to places other than those designated in the statute to which we have heretofore referred, or, to state the proposition in another form, if it was intended to assert that the defendant was not liable under count 1 for the reason that the statute requiring notice of the arrival of goods affreighted at their destination and their readiness for delivery did not apply at Florence, and that therefore it was the plaintiff's duty to make inquiry without notice, it was defective in failing to aver facts taking Florence out of the class of cities and towns in which the statute is operative. The plea was no answer to count 6 for reasons heretofore noticed when considering pleas 3 and 4.

On principles hereinabove announced the demurrers to the special replications to pleas 6 to 13 as answers to count 1 should have been sustained. These replications in substance set up the facts which had been alleged as ground of recovery by plaintiff in count 6 of the complaint. As we have seen, this was a departure.

Appellant insists that it was entitled to have the affirmative charge as to each count and as to the complaint as a whole. The matter of what notice plaintiff or its consignee should have of the arrival of the goods at destination was a matter about which the parties to the bill of lading had a right to contract according to their own convenience or pleasure. The evidence showed without conflict that by the contract the shipment was consigned to the shipper's order at Florence, Ala., with instructions to notify Green & Jenkins at that place. The bill of lading acknowl-

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edged the receipt by the defendant of the goods "addressed to S. O. Notify Green & Jenkins, Florence, Ala." Defendant's agents at Florence testified without contradiction that the goods were received at Florence in the afternoon of March 31, 1906, and notice mailed to Green & Jenkins, Florence, Ala., on the evening of March 31st, or noon of April 1st, postage prepaid. The notice was repeated some days later, at latest three days before the destruction of the goods. The property was destroyed by fire on the morning of April 20th. Under these circumstances the plaintiff could not recover on the first count. *Columbus & Western v. Ludden & Bates*, supra. But, apart from any question in respect to the application of the statute of limitation to the sixth count, the evidence as to that count was in palpable conflict and made a question for the jury. We have just recited that provision of the bill of lading which required the defendant to notify Green & Jenkins at Florence. It appeared in one aspect of the evidence that Green & Jenkins were in business at Lexington 20 and odd miles from Florence; and that they made the inquiry alleged in the sixth count of the complaint by telephone to defendant's agent at Florence. One insistence of the appellant is that the court must say as matter of law that Green & Jenkins were not plaintiff's agents in making the inquiry. But the insistence amounts to an assertion only unsupported by reason stated or authority cited. We think the cited provision of the contract made Green & Jenkins the agents of plaintiff to receive notice of the arrival of the machinery; whether the inquiry made was made in such terms as to reasonably apprise defendant of the fact that it related to the shipment in controversy was a question of fact for the determination of the jury. As for the proposition put forward by defendant's refused charge 10, we cannot concede its correctness. It asserts that neither Mrs. Moore, nor Deaton, nor Kyser, was the plaintiff's agent in making inquiry for the machinery. Deaton and Kyser made the inquiry, at different times over the telephone while Green stood at their elbow and directed what they should say. Mrs. Moore operated the telephone connection at Florence and repeated the inquiry to defendant's agent at Florence. The reliability and accuracy of all this as a means of communication was for the jury, and it was for the jury to say whether the message which finally reached the defendant, after percolation through these various agencies, did fairly apprise defendant of the fact that plaintiff was inquiring for the particular goods in controversy. So far as the question of agency is concerned, the persons named became in legal contemplation mere instrumentalities—mere parts of the telephone connection between Green, who was plaintiff's agent, and the defendant.

What we have hereinbefore said will indicate our reasons in

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disposing of charges 8, 9, and 10, refused to the defendant. They were properly refused.

Charge 5 assumes that if the machinery was safely carried to Florence, and remained in the car in which it was shipped, on defendant's track at or near the defendant's depot, it was ready for delivery. Computation of the reasonable time in which a consignee may apply for and remove freight begins from the time when the freight is at the place for delivery and ready for delivery in the manner usual or adopted by the parties. *Tallassee Falls Co. v. Western Railway*, 128 Ala. 167, 29 South. 203. That was a question for the jury, and the assumption of the charge was erroneous.

Charge 6 pretermitted all inquiry as to whether the goods were ready for delivery, and was for that reason properly refused. The effect of both charges 5 and 6 was limited by their terms to the finding under the first count, and their consideration has been so limited.

Green & Jenkins had a contract for the purchase of the machinery and the shipment was for the purpose of delivery to them. But plaintiff retained title, and the loss fell upon it. The machinery was valued at \$700, which included freight to Florence, paid by plaintiff, and the recovery was for that amount with interest. Green & Jenkins had paid \$100 on account of the purchase. Charge 7, refused to the defendant, sought to reduce plaintiff's recovery by the amount of that payment. But the terms of sale were that \$400 was to be paid on delivery. Plaintiff drew on Green & Jenkins, bill of lading attached, for \$300, and had the machinery consigned to its own order, thus evincing its purpose to retain the property until the cash payment was complete. Under these conditions the plaintiff was entitled to maintain its action, if at all, for the full value of the machinery, and it was of no consequence to the defendant that plaintiff had in its possession \$100 for which it was bound to account to Green & Jenkins. The charge was properly refused.

Charge A was abstract, and there was no error in refusing to give it. There was no evidence in support of the motion that plaintiff might have minimized the loss, nor was any negligence on plaintiff's part pleaded.

The judgment must be reversed and the cause remanded for another trial.

Reversed and remanded.

DOWDELL, C. J., and SIMPSON, ANDERSON, and EVANS, JJ., concur. MAYFIELD, J., concurs in the result.

FRAAM v. GRAND RAPIDS & I. RY. CO.

(Supreme Court of Michigan, June 6, 1910.)

[126 N. W. Rep. 851.]

Carriers—Carrier as Bailee—Goods Checked—Bailment for Hire.—Where a railroad company held itself out as willing to take charge of a suit case and redeliver it on presentation of a check, and demanded and received a certain compensation, that this compensation was small was of no consequence, its adequacy being a matter for the determination of the parties, and, they having agreed, the courts will not interfere and hold the contract a bailment for accommodation and not for hire.

Carriers—Carrier as Warehouseman—Goods Checked.*—A railroad company in maintaining a parcel room where, for a nominal charge, persons may have their belongings cared for does not act in its capacity as a common carrier, as the articles are not checked for transportation, but for safe-keeping and redelivery at the place of deposit, but acts in the capacity of a warehouseman.

Carriers—Carrier as Bailee—Goods Checked—Bailment for Mutual Benefit.†—Where a railroad company receives in its parcel room property for safe-keeping to be redelivered at the place of deposit, and makes a nominal charge, the contract is a bailment for mutual benefit, and the bailee is bound to exercise ordinary care of the property, and is liable for ordinary negligence.

Negligence — “Ordinary Care” — Question for Jury.—“Ordinary care” is such care as ordinarily prudent men, as a class, would exercise in caring for their own property under the like circumstances, and whether it is exercised or not is a question of fact for the jury under proper instructions.

Trial—Instructions—Conformity to Evidence.—In an action against a railroad company for the value of the contents of a suit case, checked in the parcel room, a charge that, it having been shown that the goods were stolen, the burden was on plaintiff to prove want of due care, etc., was properly refused, there being no evidence tending to show theft of the suit case, unless the fact that it could not be found was to be treated as such.

Carriers—Carrier as Bailee—Loss of Checked Goods—Negligence.—In an action against a railroad company for the value of the contents of a suit case, checked in the parcel room, where the evidence showed that the parcel room was left unattended for five or ten minutes at a time when trains arrived and departed, if any baggage

*See generally, extensive note, 23 R. R. R. 176, 46 Am. & Eng. R. Cas., N. S., 176.

†See first foot-note of preceding case.

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had to be placed thereon, the question of defendant's negligence was for the jury.

Carriers—Carrier as Bailee—Loss of Checked Goods—Notice of Value.—In an action against a railroad company for the value of the contents of a suit case, checked in the parcel room, where plaintiff instructed defendant's servant to be very careful as there were lots of goods in the case, and received the assurance that the company would be responsible and that he need not worry, this conversation was sufficient to warn defendant that the article was of considerable value.

Carriers—Carrier as Bailee—Loss of Checked Goods—Evidence—Negligence.—In an action against a railroad company for the value of the contents of a suit case that had been checked in the parcel room, a delay of about four hours in making inquiry about the suit case was not evidence of negligence of plaintiff.

Error to Circuit Court, Kent County; Willis B. Perkins, Judge.

Action by George Fraam against the Grand Rapids & Indiana Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

On September 26, 1908, at about 2 o'clock p. m. plaintiff, who was engaged in selling oriental goods, which he carried from place to place in a large suit case, entered defendant's station at Kalamazoo intending to take defendant's train to Grand Rapids. Upon inquiry, he found that the next train he could take would not leave until 4:20 p. m. Thereupon, he took his suit case to the baggageroom in defendant's station and asked if he might leave it there until his train left. He was told by the attendant that he would have to check it, which he did, paying five cents and receiving in return a parcel check. He then left the depot, and spent the intervening time visiting with a fellow countryman near the Michigan Central Depot. Defendant's train coming into this depot, plaintiff boarded it there for Grand Rapids, leaving his suit case at the Grand Rapids & Indiana parcel room. Upon his arrival at Grand Rapids at 5:45 p. m., plaintiff went to the baggageman, showed his parcel check, and asked if the suit case would be forwarded to him at Grand Rapids. He was assured it would be there next morning. It was not forwarded next morning, nor at any time thereafter. Plaintiff then went to Kalamazoo and made a demand for the suit case, but did not receive it. Defendant caused a careful search to be made, but the article could not be found, and has never been returned to its owner.

Plaintiff testifies that at the time he deposited his suit case with the defendant's employee, he said to the baggageman: "Be very careful, there is lots of goods here in that suit case." He said, "Well, did you have it checked?" I said, "Yes," he said, "You can have the company responsible for the suit case, don't you

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care; don't you be afraid." Defendant, at the trial, admitted the receipt of the property and offered no evidence tending to show what had become of it, except that it could not be found. Plaintiff, having recovered a judgment in a suit in trover, defendant has removed the case to this court by writ of error.

Argued before OSTRANDER, HOOKER, MOORE, MCALVAY, and BROOKE, JJ.

James H. Campbell, for appellant.

Powers & Eardley, for appellee.

BROOKE, J. (after stating the facts as above). It is contended by defendant that, in assuming to take charge of plaintiff's suit case, it acted solely for the convenience of the plaintiff, and became bailee of his property for accommodation, and not for hire. That, therefore, defendant would not be liable except for willful conversion or gross negligence.

We cannot agree with this view of the relations between the parties. It may be true, as urged by defendant, that the fee charged (five cents) for the service performed is not much in excess of the value of the check attached to the article, but we are, nevertheless, of the opinion that the insignificant amount of the charge cannot control the status of the parties. Defendant held itself out to plaintiff as willing to take charge of his property, and to redeliver it to him on presentation of the check. It demanded a certain compensation, which plaintiff paid. That this compensation was small is of no consequence. Its adequacy was a matter for the determination of the parties, and they having agreed, the courts will not interfere. *Newhall v. Paige*, 10 Gray (Mass.) 366. Moreover, the small fee charged may not be the only consideration moving from plaintiff to defendant. Railways commonly maintain parcel rooms at their depots in considerable cities where passengers and others may for a nominal charge have their belongings cared for. This service is performed not only for the accommodation of the person using it, or the immediate profit arising therefrom, but may, and probably does, result in increased patronage of and profit to the road, because of the knowledge of the traveling public that such service is afforded. This service is not rendered by the railroad company in its capacity as a common carrier, for the articles are not checked for transportation, but for safe-keeping and redelivery at the place of deposit. In this phase of its activity, the company acts rather in the capacity of a warehouseman, who, for compensation, receives and stores the goods of another.

The contract of bailment here under consideration is one for the mutual benefit of the parties, and the bailee thereunder was bound to exercise ordinary care of the subject-matter of the bailment, and is liable for ordinary negligence. Ordinary care means

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such care as ordinarily prudent men, as a class, would exercise in caring for their own property under the like circumstances, and whether it is exercised or not is a question of fact for the determination of the jury, under proper instructions. *Hofer v. Hodge*, 52 Mich. 372, 18 N. W. 112, 50 Am. Rep. 256; *Ruggles v. Fay*, 31 Mich. 141; 3 Am. & Ency. of Law, 744.

Defendant's fourth request to charge is as follows: "It having been shown that the goods were stolen, the burden was thereby placed upon the plaintiff to prove want of due care by the defendant. There being no proof of want of such due care by the defendant, your verdict must be, 'No cause of action'" (citing *Knights v. Piella*, 111 Mich. 9, 69 N. W. 92, 66 Am. St. Rep. 375). This instruction was properly refused. The record is absolutely barren of evidence tending to show a theft of the suit case, unless the fact that it could not be found is to be treated as such. In *Baehr v. Downey*, 133 Mich. 163, 94 N. W. 750, 103 Am. St. Rep. 444, this court said: "Under these circumstances, plaintiffs made out a prima facie case by showing the property in the defendants' possession, and refusal or neglect to return on demand. The onus of exoneration was then on defendants. 3 Am. & Eng. Enc. Law (2d Ed.) 750. The rule as there stated is that, when the chattels are not returned at all, the law presumes negligence, and casts upon the bailee the onus of showing he was not negligent" (citing *Knights v. Piella*, supra; *Donlin v. McQuade*, 61 Mich. 275, 28 N. W. 114).

The evidence given by defendant's witnesses shows that the room in which the suit case was placed was left unattended for five or ten minutes at a time when trains arrived and departed, if any baggage had to be placed thereon. Three trains left the depot during the afternoon. We think the question of the negligence of the defendant was, under the evidence, a proper one for the jury, and that the jury were properly instructed in relation thereto.

It is urged by defendant that plaintiff was negligent in failing to notify the baggageman of the value of the suit case, and in not calling for it at 4:20. As to the first point, we believe that his conversation with defendant's servant (if true) was sufficient to warn defendant that the article was of considerable value. He instructed the man to be very careful as there were lots of goods in the case, and received the assurance of defendant's agent that the company would be responsible and that he need not worry. Touching the second point, it appears that he did make inquiry of defendant about four hours after he had deposited the suit case. It cannot be said that this delay is any evidence of negligence on the plaintiff's part.

The other errors assigned have been considered, but require no discussion.

The judgment is affirmed.

HENDRICK'S ADM'R *v.* AMERICAN EXPRESS CO.

(Court of Appeals of Kentucky, June 9, 1910.)

[128 S. W. Rep. 1089.]

Action—Joinder—Death and Suffering of Deceased.—Action for one's suffering cannot be joined with one for her death.

Carriers—Delay in Delivering—Liability.—A carrier being informed, when a package was delivered to it for transportation, that it contained medicine for a sick girl, and that it was important that it should be delivered without delay, it is unnecessary to recovery for suffering by her from delay in its delivery, that the order for the medicine made by her father and doctor, when in fact she was unconscious, should have been with her knowledge and approval.

Appeal from Circuit Court, Muhlenberg County.

Action by Genevieve Hendrick's administrator against the American Express Company. Judgment for defendant, and plaintiff appeals. Reversed, and new trial directed.

R. Y. Thomas, Jr., for appellant.

Browder & Browder and *Trabue, Doolan & Cox*, for appellee.

CARROLL, J. Genevieve Hendricks, a child about 10 years old, being dangerously ill of pneumonia, her father, who was a doctor living at Central City, Ky., ordered on the morning of December 12, 1907, by telephone, from a drug firm in Louisville, two tanks of Walton's Compound Oxygen for the purpose of administering it to his patient and child. The oxygen was delivered to the appellee express company in time to be and was shipped on the train leaving Louisville at noon on the day it was ordered. The train on which it was sent reached Central City a little after 3 p. m. on the same day, but by the negligence of the express messenger the oxygen was not put off the train at Central City. As a result of this negligence, it became necessary to order other oxygen from Louisville, the nearest point at which it could be obtained, and this did not arrive at Central City until early the next morning. The child died, and this action was brought by her father as administrator to recover damages for the negligence of the express company in failing to deliver at Central City as it should have done the oxygen that reached there on the afternoon of the 12th.

Two causes of action were set up in the petition—one, on account of the death of the child, which was attributed to the failure to receive in due time the oxygen, and the other, to recover for the pain and suffering sustained by the child on account of the failure to receive the oxygen in time to relieve her distress. It is charged in the petition that: "Walton's Oxygen Compound,

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which is put up in cylinders, is used for and is very beneficial in cases of pneumonia, often curing the patient and saving life when all other means have failed. That said oxygen is used by means of an inhaler and breathed into the lungs of the patient, and is administered for a minute until given three times, every half hour, every hour, or every two or three hours, according to the urgency of the case. The said compound in cases of pneumonia will relieve pain and relieve trouble in the lungs when all other means have failed. * * * That at the time said compound was delivered to the defendant for shipment, as aforesaid, said company was fully notified and apprised of the character of the compound, and of the fact that it was an unusual shipment of goods of an unusual kind, and was notified of the purpose for which it was to be used. That the decedent was for 12 hours deprived of the use and benefit of the oxygen by reason of the gross and concurrent negligence of the defendant company and its agent and messenger in not delivering said compound to plaintiff at Central City in due time. That during said 12 hours said decedent was conscious and suffered excruciating bodily pain and mental anguish because of being deprived of said compound as aforesaid, which, if administered to her, would have relieved and soothed her bodily pain and consequently her mental anguish, and which could and would have been administered to her had it been delivered by defendant within a reasonable time after shipment. There was no other means of relieving her pain and anguish, all other known remedies for said disease having failed to benefit or relieve her. That said compound could not be obtained nearer than Louisville, and no sooner than it was after the first package had been carried by Central City as aforesaid. That the administration of said compound, had it been received when it should have been, would not only have relieved her of her suffering and mental anguish, but would probably have saved her life." The answer traversed the petition, and set up some other defenses not necessary to mention. Upon a trial of the case before a jury, a verdict was returned in favor of the express company. To reverse the judgment entered on the verdict this appeal is prosecuted.

There was sufficient evidence on the part of the plaintiff below to take the case to the jury; and, in view of the fact that the case must be reversed for error in the instructions it does not seem either appropriate or necessary to relate the facts.

The principal error relates to instruction No. 2, reading as follows: "The jury will find for the defendant unless they believe from the evidence that the two tanks of oxygen compound were ordered by J. G. Hendricks for the exclusive use and benefit of Genevieve Hendricks, with her knowledge and approval, and that the defendant, when said tanks of oxygen compound were delivered to it, was notified that said tanks contained medicine for

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a girl who was sick at Central City, and that it was important that said shipment should go forward and be delivered without delay." It will be noticed that the jury were directed in this instruction to return a verdict for the company unless they believed from the evidence that the compound was ordered with the knowledge and approval of the sick child. This was virtually a peremptory instruction to find for the company, as at the time the oxygen was ordered the child was in an almost unconscious condition, and, aside from this, had no appreciation or understanding of what she needed, or what kind of medicine should be ordered for her benefit or administered to her, although it is true that her father states that he told her he was going to send for the oxygen, and she said it was all right. But this instruction was given upon the erroneous idea that there could be no recovery unless the oxygen was directly ordered by the person for whom it was intended. If this were the case, then it would follow that, if a person was actually unconscious, there could be no recovery for the negligence of a carrier for the failure to deliver medicine intended for his use in a state of case in which the carrier would be liable if the medicine had been ordered by the patient. In a case like the one we are considering, it is wholly immaterial whether the medicine was ordered with the knowledge and approval of the patient or not. Any member of the family or other person interested in the patient might have ordered the medicine without the consent or approval of the patient, and the liability of the carrier would be precisely the same as if it had been ordered in person by the patient. If the child had lived, she could have brought suit in her own name to recover damages for the failure of the company to deliver this oxygen. Her administrator also had a right of action to recover damages for either her mental and physical suffering before death, or her death, although both actions could not be joined. And it may here be remarked that, upon the trial, a recovery for damages on account of the death of the child was abandoned, and it is not insisted here that the court erred in taking the case from the jury upon this question. The argument for the company is that there could be no recovery in this case unless there was evidence that the oxygen was ordered by the patient or with her knowledge and approval. Counsel say that the child was not a party or privy to the contract, that the carrier owed her no duty because it had no transaction with her, and consequently did not violate any obligation owing to her. But her physician or any member of the family or any person interested in her recovery who orders medicine for a sick person under circumstances like those shown in this case will be deemed to act as the agent of the patient, and, when so considered, the contract will be treated as if made by the patient through the agent with the company. In cases like this, so far as the duty and obligation of the carrier

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is concerned, it is not material by whom articles it fails to carry in due time are delivered to it, nor is it material for whom they are intended or by whom they are ordered. Its obligation is precisely the same whether the thing is ordered by or delivered to it by the owner or an agent or a stranger.

It is also insisted that the use of the words "two tanks of oxygen" in the instructions were misleading. We doubt if this criticism is well founded, but upon another trial, in order to remove any possible room for doubt in the mind of the jury, it might be well for the court to designate the oxygen as that delivered to the company at Louisville at noon, or as that which should have been received at Central City at 3:20 p. m.

It is further said that the court erred in instructing the jury that they could not award damages on account of the death of Genevieve Hendricks. This instruction was proper. The administrator, as we have said, could not recover in the same action for both the mental suffering and the death. On another trial these words in instruction No. 2 "that the two tanks of oxygen compound were ordered by J. G. Hendricks for the exclusive use and benefit of Genevieve Hendricks, with her knowledge and approval and," should be omitted.

Wherefore the judgment is reversed, with directions for a new trial in conformity with this opinion.

BROOKS MFG. CO. v. SOUTHERN RY. CO.

(Supreme Court of North Carolina, May 27, 1910.)

[68 S. E. Rep. 243.]

Carriers—Delay in the Transportation of Freight—Penalty—Statutes.—Neither Revisal 1905, § 2632, providing as originally enacted for a penalty for delay in the transportation of freight, nor as amended by Acts 1907, c. 461, so as to require a delivery at destination within a time specified, imposes a penalty for delay in delivery to the consignee after transportation ceases, nor compels a carrier to deliver loaded cars off its own right of way onto the private track of the consignee.

Carriers—Delivery of Freight—Contracts.—A carrier cannot be compelled to operate its engine on a private track belonging to a private corporation or individual over which the railroad has no control or supervision; but a delivery of a car load of freight to the consignee on its private track is a matter of agreement between the carrier and the consignee.

Carriers—Delivery of Freight—Contracts.—A carrier hauling its cars onto the private track of the consignee for unloading must place the car in such a position that it may be accessible for unloading.

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Carriers—Delivery of Freight—Contracts.*—Transportation ceases when the duty of the carrier as a warehouseman commences and as to freight transported in car load lots when the car reaches the destination and is placed for unloading.

Carriers—Delivery of Freight—Contracts.—A carrier leaving a car in its freightyards for unloading must place the car in such a part of its freightyards as to make it reasonably accessible for delivery before transportation ceases.

Carriers—Delivery of Freight—Contracts—"Intermediate Point."—A station at which a car must be taken out of a local train which comes into the station and then placed into another train leaving the station for the point of destination is not an "intermediate point," within Revisal 1905, § 2632, requiring transportation of freight within a reasonable time, and authorizing a delay at an intermediate point.

Appeal from Superior Court, Guilford County; Long, Judge.

Action by the Brooks Manufacturing Company against the Southern Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

The jury found the following special verdict:

"This was a shipment of a solid car load of lumber from Pittsboro, N. C., to Greensboro, N. C., consigned to the plaintiff. Shipment was over the Seaboard Air Line and the Southern Railway. The Seaboard Air Line delivered this car to the Southern Railway Company at Cary, N. C., December 13, 1906, at 4 p. m. Said car arrived at Greensboro December 16, 1906, and upon its arrival notice was given in writing to the plaintiff by the defendant by mail on December 1, 1906. That said car was placed by the defendant at the siding of the Brooks Manufacturing Company, the plaintiff, on December 18, 1906, at 6 p. m. That the distance from Cary to Greensboro is 73 miles. That a reasonable time for the going of the car from Cary to Greensboro is 1 day of 24 hours. This is not inclusive of any lay-over time that the defendant may be entitled to under the statute at either the initial point, Cary, or any intermediate point, to wit, Durham, if it is an intermediate point. The siding of the plaintiff is within one-quarter mile of the defendant's freightyard at Greensboro, and is connected by means of a switch with defendant's track in its freightyard at Greensboro, and there were physical connections by means of switches between the siding of the plaintiff and the track of the defendant leading from Sanford to Greensboro. The main line from Sanford to Greensboro runs within 30 feet of plaintiff's siding, and the main line is connected by a switch,

*For the authorities in this series on the question when a railroad's liability as a common carrier of freight terminates after its arrival at destination, see third foot-note of *Lewis v. Louisville & N. R. Co.* (Ky.), 33 R. R. R. 134, 36 Am. & Eng. R. Cas., N. S., 134.

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175 feet from the usual place of unloading. The shipments of lumber consigned to the plaintiff shipped over defendant's road are usually placed upon this siding; 95 per cent. of the same being so placed for unloading, and the other 5 per cent. being placed at other points in cases where cars have been turned over to other parties by the consignee. The car in question was not placed for unloading elsewhere than on the plaintiff's siding. The main line from Cary to Greensboro connects with the Sanford line by a switch in the Greensboro freightyards of defendant company and about one-quarter of a mile from plaintiff's siding. The schedule of the freight trains from Cary to Greensboro at the time of the shipments referred to was as follows: Train No. 183, through freight, passes Cary at 6:15 p. m.; does not stop; leaves Durham at 8:15 p. m.; arrives at Greensboro at 1:54 p. m. Train No. 163, local freight, leaves Cary at 7:30 p. m.; arrives at Durham at 8:30 a. m. This train does not go farther west than Durham, but returns to Selma from Durham. Train No. 107, local freight, leaves Durham at 10:24 a. m., and arrives in Greensboro at 5 p. m. Train No. 171, through freight, passes Cary at 10:25 p. m.; but does not stop there; leaves Durham at 11:28 p. m.; and arrives in Greensboro at 2:50 a. m. Train No. 173, through freight, passes Cary at 9:10 a. m.; but does not stop there; leaves Durham at 11:20 a. m.; and arrives in Greensboro at 2:10 p. m. That local freight trains only stopped at Cary. That the local freight ran from Cary to Durham and there that train stopped. This train stopped at Durham and returned to Selma, N. C. The car was left in the yards at Durham until the next freight was made up going to Greensboro, by which train it was brought to Greensboro. There is no question as to the payment of freight by the plaintiff. This car of lumber was not assigned by plaintiff consignee."

The following ruling and judgment was entered thereon in the superior court:

"Upon the foregoing special verdict of the jury, the question of law is left to the court to decide whether or not the plaintiff is entitled to recover. The court is of the opinion that the defendant should be allowed two days at the initial point and one day as reasonable time to have transported the goods from Cary to Greensboro, N. C. The court is also of opinion that, in view of what the Supreme court has said in *Hilliard v. Railroad*, 51 N. C. 343, and in *Alexander v. Railroad*, 144 N. C. 95 [56 S. E. 697], and other cases, the duty of the defendant in transporting the car at destination was fulfilled when it brought the car and placed it in a state ready to be delivered to the plaintiff on the siding of the plaintiff in Greensboro, having physical connection with the defendant's tracks.

"It is therefore considered and adjudged by the court, after allowing the defendant two days at the initial point and one day

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as reasonable for transportation, that the car was detained in its possession for a period of two days before finishing the transportation. It is therefore further considered that the plaintiff recover of the defendant \$30 and the cost of this action to be taxed by the clerk."

Wilson & Ferguson, for appellant.

Justice & Broadhurst, for appellee.

BROWN, J. The first assignment of error is that his honor erred in holding that the defendant was required not only to transport the car from Cary to Greensboro within the statutory period, but must within that time place the car upon the plaintiff's side track.

1. We do not construe his honor's judgment to hold exactly that, under the authority of the cases of *Hilliard v. Railroad*, 51 N. C. 343, and *Alexander v. Railroad*, 144 N. C. 95, 56 S. E. 697, cited in his judgment, it was the duty of the defendant to deliver the loaded car to the plaintiff on its private side track. Neither of those cases sustain that position. On the contrary, the *Alexander Case* expressly holds that the carrier is not penalized by section 2632, Revisal 1905, for delay in delivering the freight to the consignee after transportation ceases, and that such section does not include a failure to deliver, but only a failure to transport; "delivery necessarily requiring the concurrence of the consignee and having a distinctive meaning." Although this statute was amended by chapter 461, Acts 1907, so as to require a delivery at destination within the time specified, we have held that when the goods arrive, and the carrier has notified the consignee that it is ready to deliver, it has discharged its duty. *Wall v. Railroad*, 147 N. C. 411, 61 S. E. 277. But this statute as amended does not undertake to compel a railway company to deliver loaded cars off its own right of way and tracks onto the private track of an individual or private corporation. Therefore a delivery of the car load of lumber to plaintiff upon its private track, belonging to it and leading to its mill, must of necessity be a matter of agreement between plaintiff and defendant and cannot come within the purview of section 2632. A railroad company cannot be compelled to operate its engines on a private track belonging to a private corporation or individual over which the railroad company has no control or supervision. But whatever reasons the judge gave for his judgment, the facts set out in the special verdict sustain it. It is found as a fact therein that "the car in question was not placed for unloading elsewhere than on the plaintiff's siding." While the defendant was under no legal obligation to haul this car off its own tracks and onto the private tracks of plaintiff, yet it was its duty to place the car in a position for unloading so that it may be accessible for that purpose. Transportation ceases when the duty of the carrier as a ware-

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houseman commences, and in respect to freight transported in car load lots when the car reaches destination and is placed for unloading. *Wall v. Railroad*, 147 N. C. 408, 61 S. E. 277. What particular parts of the carrier's tracks and freightyards may be used for such purposes must of necessity be left to its discretion; but the car must be reasonably accessible and placed for delivery before transportation is fully ended.

2. The second assignment of error is that his honor did not hold that Durham was an intermediate point and did not allow the defendant any time for necessary delay there. We are unable to find in the special verdict any fact that warrants the contention that Durham is an "intermediate" point between Cary and Greensboro within the meaning of the statute. What constitutes such intermediate point is discussed and decided in *Wall v. Railroad*, *supra*; *Davis v. Railroad*, 145 N. C. 207, 59 S. E. 53.

Affirmed.

HOKE, J., concurs in result.

EATON v. NEW YORK CENT. & H. R. R. CO.

(Court of Appeals of New York, May 4, 1909.)

[88 N. E. Rep. 378.]

Negligence—"Res Ipsa Loquitur."—The doctrine of *res ipsa loquitur* negatives the degree of the proof required under certain circumstances, and is properly invoked in behalf of a case where the proof of negligence is furnished by the occurrence itself, and its application presents principally the question of the sufficiency of circumstantial evidence to justify the jury in inferring defendant's negligence.

Railroads—Injuries to Person on Station Platform—Negligence—Burden of Proof.*—A plaintiff suing a railroad for injuries received while on a station platform waiting the passage of a freight train in consequence of being struck on the head by some sharp instrument has the burden of proving the cause of the accident or a state of facts which will throw the onus on the railroad of explaining the occurrence, and the railroad need not account for what struck plaintiff.

Negligence—Presumption of Negligence—Evidence.*—An unusual occurrence resulting in injury does not of itself raise the presumption of negligence of the person charged with the performance of some duty, but the accident must be such as necessarily to involve negligence.

Railroads—Injuries to Person on Station Platform—Negligence—Evidence.*—One engaged in shipping produce in cars was injured

*See generally, first foot-note of *American Ice Co. v. Pennsylvania R. Co.* (Pa.), 33 R. R. R. 535, 56 Am. & Eng. R. Cas., N. S.,

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while standing on a station platform by being struck on the head as a freight train passed. The thing that caused the accident was not proved, but it might be explained on the theory of a temporary displacement of a part of a car, or on the theory of a forcible discharge of some object from the ground. It might have been caused by something not connected with the management of the train. The evidence of the railroad showed that there was nothing wrong about the cars. Held, that the railroad could not be made liable by the application of the doctrine of *res ipsa loquitur*.

Railroads—Liability for Injuries to Persons on Premises.†—A railroad owes to a person on its premises engaged in shipping produce the duty of exercising reasonable care; and it is not an insurer of his safety.

Edward T. Bartlett, Willard Bartlett, and Chase, JJ., dissenting.

Appeal from Supreme Court, Appellate Division, Fourth Department.

Action by John C. Eaton against the New York Central & Hudson River Railroad Company. From a judgment of the Appellate Division (125 App. Div. 54, 109 N. Y. Supp. 419) affirming by divided court a judgment for plaintiff, defendant appeals. Reversed, and new trial ordered.

A. H. Cowie, for appellant.

Frank C. Sargent, for respondent.

GRAY, J. The plaintiff upon the day he met with the accident which is the subject of this action against the defendant was engaged in shipping produce in cars, and at the time was standing upon the platform of a station of the defendant's road, waiting for a freight train to pass by in order to cross the tracks. His complaint alleged that he was struck upon the head "by some sharp instrument, either of iron or wood, extending from, or hanging to," the train. He testified that the train approached upon the track nearest to the platform, and after the engine and "a couple of cars, or some cars," had passed him, "as he looked at the train, he saw something, the outline he could not exactly describe, and he couldn't tell what it was that hit him." Again, he describes himself as standing still, in the middle of the platform, "about halfway between the station and the end of the planks;" and says: "What struck me I don't know. When I saw the thing that I saw, the hazy outline of it, it seemed very

535; foot-note of *Najarian v. Jersey City, etc., R. Co.* (N. J.), 33 R. R. 466, 56 Am. & Eng. R. Cas., N. S., 466; last foot-note of *Holland v. Northern Pac. Ry. Co.* (Wash.), 33 R. R. 264, 56 Am. & Eng. R. Cas., N. S., 264.

†See second paragraph of first foot-note of *Franey v. Union Stockyard & Transit Co.* (Ill.), 31 R. R. 357, 54 Am. & Eng. R. Cas., N. S., 357.

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close to me. * * * I couldn't say how near it was to me when I saw it, because as I saw it that was the last I can remember. I will swear positively that it was not the hazy outline of the locomotive, because the locomotive had passed me before that occurred." The plaintiff furnished no other evidence of what had caused him the injuries complained of. He was found lying between the tracks and the platform, with his skull fractured by a blow received upon the forehead, leaving a round wound "like a fifty cent piece." His left hip was also bruised. His hat was exhibited and showed a round hole through the front of the crown as its only damage. From the wound in the head were removed pieces of the hat and a splinter of wood. His son had come upon the platform with him, but he had gone a few feet away, and, his back being turned, did not see the accident. The train described was coming from the west, and there had about passed the station at the same time another train coming from the east. Nor did the plaintiff give any evidence showing or tending to show any negligence on the part of the defendant with respect to the management of the passing train from which he said his injuries were received, nor any evidence from which it might be inferred that some one of the cars may have been in a defective condition, unless, as it is contended, it is permissible from the plaintiff's story of his accident. He claims that the condition of his hat and of the wound in his head corroborates his account.

According to the defendant's evidence, as furnished by the engineer and fireman of the train, as they approached the station, the plaintiff was seen standing on the edge of the platform, and, after the train coming in the other direction had passed, to step off, when he was almost instantly struck down by the cylinder head of their engine. Their train was passing at the rate of 30 miles an hour. The head brakeman testified that the train stopped and that he went back along the south side of the train, and did not see anything projecting from it. Further evidence was given by the defendant, illustrating the general situation at this station, which is of considerable importance. According to measurements made by a surveyor, the platform facing the tracks was over $7\frac{1}{2}$ feet wide, and its edge was distant from the nearest rail nearly $5\frac{1}{2}$ feet. The plaintiff, therefore, from his account must have been standing about nine feet from the track. To the west of the station platform, and distant 94 feet therefrom, was a mail crane, the post of which stood at a distance from the nearest rail of about $4\frac{1}{2}$ feet. Still further to the west, and 544 feet distant, was a highway bridge, whose abutment, at the height of 6 feet from the ground, was about the same distance from the nearest rail as was the station platform. If anything had been projecting from the train during its

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Progress sufficiently to strike the plaintiff, it must have come in contact with the abutment or crane. But of that plaintiff offered no evidence. But, however incredible the occurrence, as narrated by the plaintiff, that was an argument to be addressed to the jury. The question presented upon the case is whether there was any evidence from which it could legitimately be inferred that the defendant had failed, in any respect, in the performance of its duty to exercise reasonable and ordinary care that the plaintiff should not be exposed to unnecessary danger; for he was present as of right upon the defendant's platform. There was nothing to explain the possibility of such an occurrence, as the plaintiff attempted to describe, in any defective condition of the freight cars. The mind would be left to speculate upon such possibilities as of a brake rod, or of some part of the planking of a car, springing out of its place, or, equally, of some object caught, and thrown forcibly, from the track, or ground, by the fast-revolving wheels of the train. If anything had become displaced upon a car, its displacement must have occurred within the $2\frac{1}{2}$ seconds which the train took in covering the distance from crane to platform, and it is reasonable to suppose that it must have been visible. The trial court refused to dismiss the case and submitted it to the jurors for their decision, instructing them that they were "allowed to infer negligence from the happening of the accident." The affirmance by the Appellate Division was by a divided court, and our examination of the case leads us to the conclusion that the defendant's motion for a nonsuit should have been granted, and that it was error to apply the doctrine of *res ipsa loquitur*.

This rule, which is so often invoked in these accident cases, was not the declaration of the discovery of some new legal principle, available to a complaint to supplement the deficiency in the required proof of the charge of negligence. The doctrine simply regulates the degree of the proof required under certain circumstances. It was a rule evoked, not from the necessity, but from the reason, of the thing. It is properly invoked in behalf of a case where the proof of negligence is furnished by the occurrence itself; that is to say, in the act proved to have caused the injury and in the attendant circumstances. In the language of Judge Cullen, in *Griffen v. Manice*, 166 N. Y. 188, 193, 59 N. E. 925, 926, 52 L. R. A. 922, 82 Am. St. Rep. 630, its "application presents principally the question of the sufficiency of circumstantial evidence to establish, or to justify the jury in inferring, the existence of the traversable or principal fact in issue, the defendant's negligence." In that case, where a person was killed by the fall of the counterbalance weights of an elevator because of the rope, to which they were attached, having been thrown off of the drum, it was held that "no such accident

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could ordinarily have occurred, had the elevator machinery been in proper condition and properly operated." There what caused the injuries was proved and the attendant circumstances were held to warrant the inference of the defendant's neglect in the discharge of the duty, owing to persons invited upon the premises, to maintain a safe elevator for their carriage. With the exercise of reasonable care such an accident, in the ordinary course of business, could not have happened. It therefore spoke for itself, as imputing neglect to the defendant. In this case the thing that caused the accident was not proved, because not known. If, at most, a guess might have accounted for it, as happening from the swinging out of some misplaced part of a car, how could that furnish a presumption of a want of reasonable care in operating the train? If there was such a temporary displacement, or if there was some forcible discharge of some object from the ground, it may have been a case of inevitable accident. The burden was upon the plaintiff to prove the cause of his injury, or, at least, a state of facts, which would throw the onus upon the defendant of explaining the occurrence. But, so far as the record discloses, the train was properly operated, and the conditions, to make such an occurrence reasonably possible, were negatived by the proof of the situation, which has been adverted to. The defendant was not required to account for what struck the plaintiff. An unusual occurrence resulting in injury does not itself raise the presumption of neglect on the part of the person who is charged with the performance of some duty. The accident must be such as necessarily to involve negligence. In *Peck v. N. Y. C. & H. R. R. Co.*, 165 N. Y. 347, 59 N. E. 206, which was an action to recover damages for the burning of a barn, standing near the defendant's tracks, it was held that it was for the plaintiff to affirmatively establish negligence in the condition or in the operation of defendant's engine, for which purpose proof of the mere occurrence of the fire was insufficient. He was not obliged to prove either the specific defect in the engine, or the particular act of misconduct in its operation, constituting the negligence. It was sufficient to prove facts and circumstances from which the jury might fairly infer that the engine was defective in its condition, or negligently operated. But what was there in this case, in fact or in circumstances, upon which the jurors might base a determination that there was defect in cars or negligence in management? It was not impossible for the accident to have been occasioned by some other cause than that of some sudden and temporary defect in the condition of a car. In *Robinson v. Consolidated Gas Co.*, 194 N. Y. 37, 40, 86 N. E. 805, 807, it was observed, with reference to this rule: "If proof of the occurrence shows that the accident was such as could not have happened without neg-

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ligence according to the ordinary experience of mankind, the doctrine is applied even if the precise omission or act of negligence is not specified, and even when it does not appear whether the accident was owing to some act done or to some act not done. It is applied when the inference of negligence is required by the nature of the occurrence. * * * If, however, proof of the occurrence shows that the accident might have happened from some cause other than the negligence of the defendant, the presumption does not arise and the doctrine cannot properly be applied." If the theory of the right to maintain such an action is to be observed, then a plaintiff cannot avoid the burden of proving negligence on the part of the defendant directly or by circumstances from which negligence may legitimately be inferred. There was no witness of the plaintiff's accident. Nothing happened to the train itself. There was nothing wrong about the cars, according to the defendant's evidence; and there is no other evidence upon the subject, and how the plaintiff was injured remains a subject of pure speculation. The res, or the act, was not shown; and how can the maxim relied upon be applied when that is unknown? The injury may as well have been caused by something not connected with the management of the train as by something in connection with it. Indeed, upon a fair consideration of the surroundings, that seems the more likely. But, whatever was the act causing the injury, if incapable of being shown, the defendant cannot be made liable, in the absence of any proof of negligence, by the application of the rule of *res ipsa loquitur*. It was not an insurer of the plaintiff's safety. It owed him only the exercise of reasonable care while upon its premises.

For these reasons, the judgment should be reversed and a new trial should be ordered; costs to abide the event.

CULLEN, C. J., and WERNER and HISCOCK, JJ., concur. EDWARD T. BARTLETT, WILLARD BARTLETT, and CHASE, JJ., dissent.

Judgment reversed, etc.

HENDRICKSON *v.* WISCONSIN CENT. RY. CO.

(Supreme Court of Wisconsin, May 24, 1910.)

[126 N. W. Rep. 686.]

Railroads—Injuries to Persons Working about Cars.—The evidence and the findings of the jury in an action by the foreman of a granite company against a railroad company for injury to plaintiff, through the negligence of defendant's servants, while plaintiff was assisting defendant's conductor in repairing the brake of a car which was being placed on the granite company's side track, held to show that plaintiff was rightfully at the place of accident, and was engaged in a service within the scope of his employment and duties, in which his master and defendant had a common beneficial interest, so as to make defendant liable.

On rehearing. Affirmed.

For former report, see 122 N. W. 758.

Walter D. Corrigan (*Glicksman, Gold & Corrigan*, of counsel), for appellant.

Among references cited on the part of the appellant were: *Atlanta, etc., Ry. Co. v. West*, 121 Ga. 641, 49 S. E. 711-712, 67 L. R. A. 701, 104 Am. St. Rep. 179; *Railway Co. v. Bolton*, 43 Ohio St. 224, 1 N. E. 333-335, 54 Am. Rep. 803; *Wright v. London, etc.*, 10 B. Div. 252; *Eason v. Railway Co.*, 65 Tex. 577, 57 Am. Rep. 606; *Welch v. Maine, etc.*, 86 Me. 552, 30 Atl. 116, 117, 25 L. R. A. 658; *Louisville, etc., v. Ward*, 98 Tenn. 123, 38 S. W. 727, 60 Am. St. Rep. 848; *Cincinnati, etc., Ry. Co. v. Finnell's Adm'r*, 108 Ky. 135, 55 S. W. 902, 57 L. R. A. 266-267; *Longa v. Stanley, etc., et al.*, 69 N. J. Law, 31, 54 Atl. 251; *Langan v. Tyler*, 114 Fed. 716, 51 C. C. A. 503; *Wright v. Railway Co.*, L. R. 1 Q. B. 252; *Holmes v. Railway Co.*, L. R. 4 Exch. 254.

John C. Hart and *B. R. Goggins*, for respondent.

Among references cited on the part of the respondent were: *Sloan v. Railway Co.*, 62 Iowa, 728, 16 N. W. 331; *Fox v. Railway Co.*, 86 Iowa, 368, 53 N. W. 259, 17 L. R. A. 289; *Georgia, etc., Ry. Co. v. Propst*, 83 Ala. 518, 3 South. 764; *O'Donnell, Adm'r of Welch, v. Maine, etc., Ry. Co.*, 86 Me. 552, 30 Atl. 116, 25 L. R. A. 658; *McIntire v. Bolton*, 43 Ohio St. 224, 1 N. E. 333; *Cleveland, etc., R. Co. v. Marsh*, 63 Ohio St. 236, 58 N. E. 821, 52 L. R. A. 142; *Kelly v. Tyra*, 103 Minn. 176, 114 N. W. 750, 115 N. W. 636, 17 L. R. A. (N. S.) 334; *Meyer v. Kenyon-Rosing Mach. Co.*, 95 Minn. 329, 104 N. W. 132; *Eckert v. Great N. Ry. Co.*, 104 Minn. 435, 116 N. W. 1024; *McConnell v. Penn. R. Co.*, 223 Pa. 442, 72 Atl. 849; *Eason v. S. E. & C. Ry. Co.*, 65 Tex. 577, 57 Am. Rep. 606; *Railroad Co. v. Ward*, 98

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Tenn. 123, 38 S. W. 727, 60 Am. St. Rep. 848; Weatherford, etc., Ry. Co. v. Duncan, 88 Tex. 611, 32 S. W. 878; Texas, etc., R. Co. v. McDonald (Tex. Civ. App.) 85 S. W. 493; Pickwick v. McCauliff, 193 Mass. 70, 78 N. E. 730; Hartford v. N. Y., etc., R. Co., 184 Mass. 365, 68 N. E. 835, 836; Maguire v. Fitchburg, 146 Mass. 379, 15 N. E. 904, 908; Rink v. Lowry, 38 Ind. App. 132, 77 N. E. 967, 969-970; Hudgens v. St. Louis, etc., Co., 139 Mo. App. 44, 119 S. W. 522; Dooley v. Mo., etc., R. Co. (Tex. Civ. App.) 110 S. W. 135; Mo., etc., R. Co. v. Thomas (Tex. Civ. App.) 107 S. W. 868; Cincinnati, etc., R. Co. v. Rodes, 31 Ky. Law Rep. 430, 102 S. W. 321; C., etc., R. Co. v. Pettit, 111 Ill. App. 172; B. & O. R. Co. v. Charvat, 94 Md. 569, 51 Atl. 413; Toledo, etc., R. Co. v. Miller (Ind. App.) 88 N. E. 968; Baltimore, etc., R. Co. v. Trennepohl (Ind. App.) 87 N. E. 1059; Louisville, etc., Co. v. Crow (Ky.) 118 S. W. 365; Louisville, etc., Co. v. Hurst (Ky.) 116 S. W. 291; Smalley v. Rio Grande, etc., Co., 34 Utah 423, 98 Pac. 311; Shall v. Detroit Ry. Co., 152 Mich. 463, 116 N. W. 432; Tinkle v. St. Louis, etc., R. Co., 212 Mo. 445, 110 S. W. 1086; Louisville, etc., R. Co. v. Farris, 30 Ky. Law Rep. 1193, 100 S. W. 870; Louisville etc., R. Co. v. Smith, 27 Ky. Law Rep. 257, 84 S. W. 755; Cent., etc., R. Co. v. Duffey, 116 Ga. 346, 42 S. E. 510; Watson v. Railway Co., 66 Iowa, 164, 23 N. W. 380; Lowenstein v. Mo. Pac. Ry. Co., 134 Mo. App. 24, 119 S. W. 430; Eaton v. N. Y. Cent., etc., Co., 195 N. Y. 267, 88 N. E. 378; Barry v. Hannibal, etc., R. Co., 98 Mo. 62, 11 S. W. 308, 14 Am. St. Rep. 610; Chicago, etc., R. Co. v. Pritchard, 168 Ind. 398, 79 N. E. 508, 81 N. E. 78, 9 L. R. A. (N. S.) 857, 865; Klugherz v. Railway Co., 90 Minn. 17, 95 N. W. 586, 101 Am. St. Rep. 384; Rowley v. Railroad Co., 135 Wis. 208, 218, 219, 115 N. W. 865; Ill. Cent. R. Co. v. Hopkins, 200 Ill. 122, 65 N. E. 656; Elgin, etc., Ry. Co. v. Thomas, 215 Ill. 158, 74 N. E. 109; Hudson v. Atlantic, etc., R. Co., 142 N. C. 198, 55 S. E. 103; Bain v. Northern Pac. R. Co., 120 Wis. 412, 98 N. W. 241; Promer v. M. L., etc., R. Co., 90 Wis. 215, 63 N. W. 90, 48 Am. St. Rep. 905; Ft. Worth, etc., Ry. Co. v. Eddleman (Tex. Civ. App.) 114 S. W. 425; Iltis v. C., M., etc., Co., 40 Minn. 273, 41 N. W. 1040.

SIEBECKER, J. The propositions urged by the appellant on this rehearing are that by the decision of this court its liability to plaintiff is placed upon the relation existing between it and the plaintiff as an employee of the granite company, while he was engaged in a service which furthered the common interest of the defendant and his employer; that the issues as to this liability were not litigated or determined at the trial before the lower court; and, if judgment can be awarded on the existing state of the record, it should be in appellant's favor.

There is no controversy but that the rule of liability which

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was applied to the case in the decision of this court is well established by the adjudications. The contention is that the question of defendant's liability under this rule of law was not litigated at the trial, and that, upon the facts found by the jury and the undisputed evidence in the record, no case was established which entitled plaintiff to recover as this court decided. These subjects have been ably argued by counsel for the respective parties, and their collection of the adjudications in elucidation of them will be preserved in the published report of the case for future aid and reference.

The decision of the case rested on the ground that plaintiff at the time of injury was performing a service within the scope of his employment and duties, and that it furthered the common interest of his master and the railroad company. It is earnestly argued that this conclusion is erroneous, because there is no finding by the jury that plaintiff was performing an act which furthered the common interest of the defendant and the granite company, and that the undisputed evidence will not permit of such an inference. It is claimed that the evidence tends to show that plaintiff's duties in no way required him to be near the cars which were being switched, or to assist in spotting and anchoring them on the granite company's switch track. The facts relied on for this contention were brought to our attention at the former argument, and re-examination of them convinces us that our conclusions respecting plaintiff's duty to attend the reception of empty cars and see that they were properly placed and anchored on the switch track preparatory to loading by the granite company's employees are correct, and that plaintiff was rightfully at and about the place and track when this switching was being done. It is manifest that the cars were to be so anchored and placed at the time they were switched onto the side track as to facilitate the business of the granite company, and that the plaintiff was delegated to see that this purpose and object was accomplished. In the course of the performance of this duty, he would go near the track so as to be on the ground at the time of switching, and would participate in the operation of anchoring the cars by directing and placing the cars on the track where they could be most conveniently and expeditiously prepared and handled for loading. On the occasion in question, it appears that he attempted to block the rear car at the proper place of anchorage, when he discovered that it had started to run toward the tunnel. These facts, and the accompanying circumstances of the conduct of this business by the defendant and the granite company, make it clear that plaintiff was performing duties in the line and scope of his employment as a servant of the granite company, and that he and the railroad company's employees were mutually engaged in anchoring the

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empty cars on the side track. In view of these facts and circumstances, and the situation in which the plaintiff was placed while so engaged with defendant's servants in accomplishing this purpose, we discover no room to question but that the service so rendered by them was mutually beneficial, both to the railway company and to the granite company.

It is vigorously contended that the plaintiff's participation in the work of repair of the brake shows as a matter of law that what he did was wholly outside of his master's business, and that he at the time stepped out of his employment, and that he was a trespasser, intermeddler, or mere volunteer in going onto the track in the rear of the car to participate in adjusting the brake. The argument is that the repair of this brake was an act peculiarly within the exclusive duty of the defendant's employees and wholly foreign to plaintiff's duties; that it was wholly unnecessary to make such repair to enable the defendant to spot and anchor the car; and that neither the granite company's nor the defendant's business required this service to be done at this time and place. We perceive nothing in the nature of this repair to support the claim that it was peculiarly within the duties of the servants of the railway company. It was a simple defect, of an ordinary nature, which any person engaged in anchoring these cars might readily undertake to remedy. The claim that it was wholly outside of the scope of plaintiff's employment, in view of his relation to the business that was being conducted by the railway company for the granite company, is, in our opinion, not well sustained. We have adverted to plaintiff's duties in acting for the granite company in the conduct of this particular business. It is evident from the facts shown that an efficient brake was an important essential for spotting and anchoring the cars by the railroad company. It also appears that it was an important and serviceable device for handling the cars so as to have them spotted and anchored where the granite company wished to have them placed for loading and putting its product in transit for the market. These various uses of the brake made it mutually and beneficially serviceable to both companies for their immediate and future purposes. In the light of this situation, its immediate repair was most natural and appropriate, and the fact that the railroad company could thereafter have repaired it does not militate against plaintiff for participating in making the repair, or tend to show that he was a meddlesome participant in this attempt to provide an efficient brake. The conduct of the defendant's conductor and plaintiff in dealing with the situation thus presented to them in the course of their employment accords with a reasonable compliance with their duties, and tended to further the immediate purposes of the objects of the service they were charged to perform, and

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establishes the fact that the plaintiff was rightfully there to help fix the brake.

The evidence respecting the service that was being performed and the consequent relation it bore to plaintiff is not in dispute, except as to whether or not he stepped upon the track at the request of Conductor Dixon, and undertook to assist in the repair of the brake at the place of accident. This specific issue of facts is covered by the fourth question in the special verdict, and is answered in the affirmative. It therefore follows that the record as to these facts is complete and sufficient, and no further trial of them is necessary.

The controversies between the parties respecting the defendant's negligence, its proximate cause of the accident, and plaintiff's contributory negligence are not open to inquiry on this rehearing. The record, therefore, presents a determination of all the issues raised by the pleadings and the evidence essential to plaintiff's cause of action. From the facts established, it is considered that the plaintiff was rightfully at the place of accident and engaged in a service in which his master and the railway company had a common beneficial interest, and hence that he is entitled to recover his damages, and the judgment must stand. Judgment affirmed.

DUBOSE v. NEW ORLEANS RY. & LIGHT CO.

(Supreme Court of Louisiana, May 10, 1909.)

[49 So. Rep. 696.]

Decisory Oath about Condition of Defendant's Road.—The answers to interrogatories propounded by plaintiff to defendant's employees on facts and articles prove that the roadbed, the rails, the cars, and the running appliances and devices were in good repair.

Street Railroads—Operation—Duty.—The accident did not occur at a crossing. The rule applicable to crossings has no direct bearing.

Right to Use Street and Care Required.—The right to the use of the street and the extent of care each should exercise—the pedestrian and the company—gave rise to the question for decision.

Rate of Speed—Street Car.—While the rate of speed (15 miles an hour) was too rapid, that rate has received some sanction.

Street Railroads—Injuries to Persons on Track—Contributory Negligence.*—If the plaintiff, despite the speed, was at fault, he cannot recover.

*For the authorities in this series on the question of proximate cause where the person injured by a train or car, while crossing track, was negligent in going upon track and the train or street car was being operated at an unlawful or negligent speed, see foot-note of *Butler v. Rhode Island Co. (R. I.)*, 28 R. R. R. 322. 51 Am. & Eng. R. Cas., N. S., 322.

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Street Railroads—Duty of Pedestrian to Look and Listen.†—The pedestrian should look and listen before stepping on the track of a street car.

Operation of Street Car.—The car was not traveling on a narrow and crowded street, late at night. There were few persons on the street. The car was lighted. The street is straight. The coming car and its usual noise could have been heard.

Street Railroads—Injuries to Persons on Track—Contributory Negligence.—The plaintiff suddenly stepped from behind an automobile, standing still, to the track. It was not possible for the motorman to stop the car in time to avoid the accident.

Contributory Negligence.—Plaintiff, by leaving the place where he was in the rear of the automobile and stepping on the track, gave rise to the proximate cause.

When he crossed over to the coming car with which he collided, he was about five feet from the coming car. Had the car been running slower, the danger would have been the greater, as he would have had time to step further on the track.

Street Railroads—Injuries to Person on Track.—The necessity of being careful about the speed of a street car is not as urgent at 12 o'clock at night as it is during the active business hours of the day, when there are many persons and vehicles on the street.

(Syllabus by the Court.)

Appeal from Civil District Court, Parish of Orleans; George Henry Thread, Judge.

Action by James G. Dubose against the New Orleans Railway & Light Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Howell Carter, Jr., Stafford & Lambert, and Henry W. Robinson, for appellant.

Hall & Monroe, for appellee.

BREAUX, C. J. Plaintiff is a farmer, and at times during the year travels as a salesman. He is 50 years old.

He sued for \$28,080.50 damages for asserted personal injuries.

The district court rejected his demand.

In December, 1906, he came to New Orleans to take employment with Flashpoller Company as a traveling salesman.

After having met his employer and agreed with the firm to go on the road, he returned to his room and retired early for a night's rest. He was restless, could not sleep. He arose,

†See last foot-note of *Carroll v. Connecticut Co. (Conn.)*, 34 R. R. R. 780, 57 Am. & Eng. R. Cas., N. S., 780; third foot-note of *Hellieson v. Seattle Elect. Co. (Wash.)*, 34 R. R. R. 337, 57 Am. & Eng. R. Cas., N. S., 337; first foot-note of *Cable v. Spokane, etc., R. Co. (Wash.)*, 31 R. R. R. 206, 54 Am. & Eng. R. Cas., N. S., 206.

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dressed, and repaired to the street for a walk to compose his nerves and invite sleep, and on his way back from his walk he attempted to cross a street not far from his hotel.

Not being well acquainted with the city, he did not recall, while testifying, the name of the street.

Other witnesses who were present and saw the car strike him located the accident near the corner of St. Charles street and Perdido street, a well-known intersection of the two streets.

The latter, Perdido, extends no further toward the river than St. Charles street.

After the blow inflicted by the car, the testimony is that it ran on a greater distance than cars generally run after appliances are put on to stop them. The testimony disagrees as relates to the distance it ran immediately after the accident. From 50 or 60 feet to 250 feet is the varying testimony of the witnesses. All agree that the car was running at a rapid rate of speed.

The motorman testified, however, that it could not have been over 15 miles an hour, as that was the maximum speed of the car.

The plaintiff was on the river side of St. Charles street crossing over and coming from behind an automobile, which was at rest on the left side of the street going up.

The front of the automobile was toward the coming car.

Plaintiff was hit in the face and thrown against the curbing on the south side of the street. The impact with the car resulted in grave and painful injuries rendering him unconscious.

After he had recovered his consciousness, he was taken to the hospital.

He was confined to his bed over a month, and suffered excruciating pain. He was very much bruised.

One of the plaintiff's complaints is that the car was not in good condition. The brakes did not sufficiently respond to the motorman's appliances. The roadbed was not in good repair. The rails were covered with ooze from the mud near by and were slippery.

These averments have lost their importance. Plaintiff propounded interrogatories on facts and articles to defendant's employees. They were answered in accordance with the order of court, and on return of the answers they were offered in evidence by the plaintiff.

Under well-settled rules, he is bound by the answers. Of this later.

Plaintiff charged that the defendant and its employees were negligent in running the car at too great a rate of speed and in not stopping it in time to avoid the casualty.

Defendant's contention is: That plaintiff was out of view of the motorman; that he was covered from sight of the motorman

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by an automobile, which was standing near the curbing of the street on the river side; that plaintiff came suddenly from the side of the street to the front of the car; that he came out from behind the automobile, three, four, or five feet from the advancing car.

The averment is that the automobile was standing right in front of the Orpheum Drug Store, and that it was on plaintiff's coming out from the sidewalk right behind it and starting to cross the street that he was struck.

In regard to answers on fact and articles, to which we referred above in stating the salient facts:

The employees to whom questions were propounded testified that from time to time the company made needful repairs to its roadbed and everything connected with the road, that it had been inspected, and that everything about the track and cars and appurtenances was in good running shape.

There is a complete denial in the answers of witnesses of all averments regarding the asserted bad condition of the road. It follows that the road must be taken to have been in good condition.

The testimony about the ringing of the bell of the car—another incident which figures in nearly every accident within the limits of a city—is conflicting.

The first witness for the plaintiff did not recall anything about bells, another paid no attention, and still another did not remember hearing bells.

The motorman, witness for the defendant, swore that he rang the bell, which testimony is corroborated by the conductor.

Two witnesses, one the wife and the other the husband, Mr. and Mrs. E. H. Wilson, not at all interested, said that the motorman was ringing his gong at the time. We will refer again to the testimony of these two witnesses, as it is important. They had no interest whatever in the controversy.

Now regarding the accident itself:

The witness whose name is Drouet (not an employee of the road) said: That he was standing by the restaurant named "The Rattskeller" on the river side of St. Charles street near Perdido street at about 11:50 o'clock p. m. He saw the car coming from above on its way down at full speed. That plaintiff was in front of Dr. Pratt's drug store. From there he crossed into the street and passed around the rear of the automobile in front of the coming car. He was struck by the car and thrown to the street near the gutter. The witness adds that the car was going too fast.

This witness is in the main corroborated by the employees of defendant.

Mr. and Mrs. Wilson, the witnesses before referred to, stated: That they were going up St. Charles street. The car

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came down at full speed. They saw the plaintiff when he crossed from the sidewalk behind the automobile, and saw the car hit him; saw the top part of the dashboard strike him about the bridge of the nose, throwing him down on the side of the gutter. That plaintiff was unconscious three or four minutes. That he was a very tall man and almost reached the top of the dashboard with his nose. That when he was struck he had one foot on the track and one foot on the street. The motorman could not do anything, as he could not see the man behind the automobile, and, if the street car had been going slower, the plaintiff would have been in the center of the track and would have been killed. That the accident was not the fault of the motorman.

The motorman testified that he put on the "reverse" and did all he could to stop the car.

It is in place to state that the plaintiff is slightly deaf.

Also, that the rails were made slippery by the dense fog.

The following quotation specially referred to by counsel for plaintiff in his brief we will insert here. They are plaintiff's answers as a witness:

"Q. There was no car approaching you?

"A. No, sir; I did not see anything at all.

"Q. Did you hear anything on either side?

"A. Yes, sir; I think, but I am not sure. I think I heard some kind of a noise in crossing the street. I looked to my right, and just then I was struck. I thought I heard a noise of some kind. I am not sure of that. You know how it is with a country fellow in the city. I thought I heard some noise approaching me, and I looked to the right."

He added that he did not see the automobile.

The following is a contradiction of the testimony just quoted: To Pagnac, the motorman:

"Q. You did not hit the automobile at all, did you?

"A. No, sir; when I came near the automobile he ran out, and I struck him, and when I struck him I pulled the trigger, but the car kept slipping, and she stopped about 70 feet from where I hit him.

"Q. He came out from behind the automobile?

"A. Yes, sir.

"Q. How far was the car from the automobile when he came out from behind it?

"A. My car was right about the front, well just like this. This is the hind wheel of the automobile (indicating), and this is the front wheel (indicating), and he stepped out, and the automobile was about four feet from the track."

There was a slight variance in the testimony of the witness Pagnac at one time, but he corrected his testimony by stating that he saw plaintiff right behind the automobile, and that he

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was just on the track about a foot from the track when he saw him; that the automobile had a top to it.

The weight of the testimony shows that there was an automobile, as before stated. It is not so certain that it was an automobile with a top. We are inclined to the opinion that it had a top. It was in winter. In winter nearly always these vehicles have a top. Besides, several witnesses testified that it had a top.

The witnesses testified that the car was running at a high rate of speed. One of the number testified (and he seems to be supported by the facts) that it was about 15 miles an hour, as the car could not run any faster. That was the maximum number of miles of its speed.

Another witness testified that it was running 20 to 25 miles an hour. This witness evidently had an extravagant idea of the speed.

We must say that 15 miles an hour is too fast. None the less, it has received judicial sanction.

See *Hebee v. New Orleans R. R.*, 110 La. 978, 35 South. 251.

Despite the rapid rate of speed, if the cause of the accident was owing to the fault or imprudence of the plaintiff, he is not in a position to recover damages. See decision just cited, *supra*, page 978 of 110 La. (35 South. 251).

Perdido street, near which the accident happened, is not a crossing of St. Charles street. It follows that there was no crossing where the accident occurred.

The time of the accident was about 12 o'clock at night, an hour when there are very few passengers on the street. The necessity of being careful about speed is not as urgent then as it is during the active business hours of the day, when there are many persons and vehicles on the street.

At the moment of the accident, we have noted that there was only one automobile standing near the curb. It was in line of vision both of the motorman and of the plaintiff.

The complaint of plaintiff at this point is that the motorman did not check his car.

It is not negligence if the motorman does not check his car to pass an automobile standing on the side of the street, as it was not a crossing. Besides, the rule in question applies when a car meets another at crossings.

The failure to moderate the speed of the car will not afford good ground of complaint, if the plaintiff failed in performing the full measure of his duty, if he failed in exercising his faculties of hearing and seeing.

There is ground to think that he did not so exercise his faculties of seeing and hearing.

The testimony is that the motorman did seek to stop his car. It could not be stopped in time. The plaintiff stepped from be-

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hind the automobile and was at the time within five feet of the front of the car.

According to two witnesses, who were not in the employ of the defendant, the plaintiff at the time of the nearly fatal blow had one foot resting on the asphalt of the street and the other on the first rail of the track. He came unexpectedly on the track.

The stepping suddenly on tracks on which there are running cars is always dangerous if the pedestrian does not exercise some little care. If he does not exercise some degree of care, there is scant ground for his recovering damages.

It is true that the company must be held to the necessity of exercising some care—"such a care as a reasonably prudent man would exercise under the circumstances." Elliot, § 1156.

But this accident did not occur at a crossing, as we have already stated. The quotation from the above commentator applies to crossings. At other places (on the road away from crossings) pedestrians must not step unexpectedly in front of the coming car. The duty of a company at a crossing is different from that along its line away from crossings.

We have alluded to the duty at crossings in order to bring out and make as plain as possible the necessity of caution at other places than crossings.

Now as to negligence:

If the evidence proves that the plaintiff was partly at fault, he cannot recover. Baldwin, Am. R. R. Law, p. 421.

The distance covered by the car immediately after the accident is referred to by plaintiff as indicating the negligence of the defendant company.

Despite the decision in the Hebee Case, cited *supra*, the testimony certainly proves a too rapid rate of speed of the car.

But that does not relieve plaintiff from all fault if he was negligent.

All of plaintiff's witnesses testified that, had it not been for the rapid rate of speed, the plaintiff would have been killed, as he would have been struck on the track and crushed. As it was, the car struck him on the side and threw him off in the direction of the curve, instead of running over him.

This ground is reiterated by plaintiff, and for that reason it was taken up at this time for discussion.

Plaintiff charges that defendants were negligent because they retained the motorman in their service, although he had several accidents before the one of which he complains.

It can easily be said in defense of this charge that the present accident was the only grave accident that had fallen to his lot as motorman. The motorman does not appear to have been incompetent on this ground.

The motorman denied that he had ever met with other acci-

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dents. The explanation afterward was that he meant he had never met with a serious accident which had given rise to damage suits.

There is no proof before us in matter of these accidents preceding the one before us for consideration that the motorman was at fault.

There is no merit in this charge.

Plaintiff's next complaint is that the track was slippery from moisture and oozing with mud; that the road was not in good repair.

In argument learned counsel for plaintiff cited *Mauer v. Brooklyn R. R. Co.*, 87 App. Div. 119, 84 N. Y. Supp. 76 (not the court of last resort of New York).

In the cited case the plaintiff attempted to cross the street following a diagonal line on the street in which the track of defendant was laid in order to take another street. Plaintiff looked and saw a coming car. She looked a second time, and it was already within a half block from her. In a moment after she was struck.

The court found that, although the street which she had left and the street to which she was going were not directly opposite each other, none the less there was an intersection and crossing. The court in substance said: It being a crossing, the right of the pedestrian and the right of the defendant was equal.

There is considerable difference between the cited case and the case here. In the latter the testimony does not prove that Commercial alley in this city, from which the plaintiff came a few moments before the accident, and Perdido street, constituted a street intersection or crossing, as they are some distance apart. Plaintiff just before the accident occurred was not attempting to walk from one of the streets above named to the other. He followed the sidewalk, and then turned at right angles behind an automobile, and then to the front of the coming car.

The cited case has no application because there is not a constructive or any other crossing at the place of the accident. The testimony shows that at this place St. Charles street is straight. The line of vision is unobstructed up and down the street. There was no bustle of any kind on the street. All was quiet. The car was lighted. Witnesses swore that the bell was ringing. There must have been the usual noise and rumbling of the car.

Because of these it is reasonable to infer that plaintiff should have seen the car, and would have seen it if he had looked with any degree of care. If he had seen the car, it is also reasonable to infer that there would have been no accident.

Learned counsel for plaintiff also cited with confidence *Wells v. Brooklyn R. R.*, 58 Hun, 389, 12 N. Y. Supp. 67.

In the cited case plaintiff did not see that the car was coming.

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The court said he probably assumed that the rate of speed was less than it was and decided for plaintiff.

In the case before us for decision, plaintiff did not assume anything, for he did not see the car at all, although there was no good reason shown why he did not see the car coming. It may be that plaintiff's view was obstructed by the automobile, to which we have already made some mention.

That alone would not afford ground sufficient for holding the defendant liable. It was his misfortune not to have seen the car from behind the auto car.

The position here is peculiar. Plaintiff at one time in argument urged through learned counsel that he did not see the car owing to the automobile. Defendant complains of the same obstruction of view. Both are unfortunate in this respect.

Plaintiff having left the place of safety on the sidewalk and stepped behind the automobile, and unexpectedly from that point to the front of the car, he cannot recover.

It was said in argument that plaintiff's head protruded above the automobile, and that if the motorman had looked he would have seen him.

This contention is met by the fact that in the dark it is not always an easy matter to locate a person standing at some little distance behind an obstructing body. The protruding head may have been taken as that of some one sitting in the automobile, and then it may well be that the motorman did not suspect that the plaintiff would leave the place of safety at which he was in order to attempt to cross.

One of the witnesses for plaintiff was near him at the time. He testified that he saw the car coming and walked obliquely in order to pass behind it after it had passed.

It is unfortunate that plaintiff was not equally as prudent.

Personal injury cases frequently present varying phases. They are usually hard cases. The application of rules must be made as they are laid down in jurisprudence. Sympathy or feeling on account of loss and suffering must be laid aside. It must be a matter of judgment.

We have given this case careful consideration. It was not possible for us to arrive at another conclusion.

For reasons stated, the judgment is affirmed.

LOUISVILLE & N. R. Co. v. ZEIGLER.

(Supreme Court of Alabama, May 10, 1910.)

[52 So. Rep. 599.]

Railroads—Animals on Track—Liability for Killing—Complaint.—

In an action against a railroad company for negligently killing plaintiff's dog, the complaint need not name the employees of defendant in charge of the train by which the killing was done.

Railroads—Dogs Killed on Track—Liability of Railroad Company.*—That plaintiff's dog was a trespasser on defendant's railroad track at the time of the passing of one of defendant's trains did not preclude a recovery for his death.

Witnesses—Knowledge—Value.—Where, in an action for negligently killing a dog, a witness testified that he did not know the value of the dog, and had no knowledge of the value of dogs, the court did not err in sustaining objections to questions put to the witness as to whether the dog was worth \$5, or more than \$10.

Appeal from Circuit Court, Elmore County; W. W. Pearson, Judge.

Action by T. J. Zeigler against the Louisville & Nashville Railroad Company. Judgment for plaintiff, and the defendant appeals. Affirmed.

The first count was as follows: "Plaintiff claims of the defendant the sum of \$100 as damages, for that on, to wit, the 23d day of February, 1908, plaintiff owned a certain dog, whose value was \$100, being a thoroughbred hound; that on said date the defendant corporation was engaged in operating a railroad in the state of Alabama, in Elmore county, between the stations known as Elmore and Coosada; that on said date the said Louisville & Nashville Railroad Company, had under its direction and control a train of cars, same being operated between said stations of Elmore and Coosada on said railroad; that the said Louisville & Nashville Railroad Company had in its employ certain servants and agents in charge of said railroad train, and that the said servants, agents, and employees of said railroad company so negligently and carelessly operated said train on said date that the locomotive attached to said train was propelled with great violence and force against the said dog of this plaintiff, whereby the death of the said dog was caused, to the damage of plaintiff." etc.

Count 2: "For that on February 23, 1908, the defendant op-

*For the authorities in this series on the subject of the duties and liabilities of railroad companies with respect to running trains against dogs, see foot-note of El Dorado & B. Ry. Co. v. Knox (Ark.), 32 R. R. R. 322, 55 Am. & Eng. R. Cas., N. S., 322.

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erated a railroad in the county of Elmore, state of Alabama, and a certain train of cars on said railroad, between the stations of said county known and called Elmore and Coosada; that at a point between said Elmore and Coosada on said railroad is a small trestle; that the plaintiff on said date owned a certain valuable dog, which was on said bridge going along or across said trestle; that the said train of cars, under the control, superintendence, and direction of the servants, agents, and employees of the defendant corporation, was being operated on said track of said railroad, and that the said train of cars was so negligently operated through said servants, agents, and employees of said corporation in crossing said trestle that the plaintiff's dog was struck by the locomotive attached to said train of cars, and was mangled, torn and killed. Wherefore the plaintiff was deprived of the said valuable dog, of the value of \$100; hence this suit."

The demurrers assigned were: "(1) That it did not show that the dog killed was of any value. (2) It failed to show any duty owing from the defendant to the plaintiff in regard to the dog killed. (3) It shows that the dog was a trespasser. (4) Because it is a matter of common knowledge that a thoroughbred hound has no value. (5) Because it fails to aver the name of the servant or employee of the defendant in charge of the train."

Goodwyn & McIntyre, for appellant.

Frank W. Lull, for appellee.

DOWDELL, C. J. On the trial of the case the court charged out the third, fourth, and fifth counts of the complaint, and consequently the rulings of the court on the demurrers to those counts need not be considered.

The first and second counts of the complaint, which confessedly charged a negligent killing of the plaintiff's dog, were not subject to any of the grounds stated in the demurrer to the complaint. It is insisted in brief by counsel for appellant that no liability for damages rests upon the railroad company for the negligent killing, for the reason that it is inferable from the complaint that the dog was a trespasser on the track when killed. The law of this state as to trespassing animals is opposed to the contention of appellant. *Central of Ga. Ry. Co. v. Martin*, 150 Ala. 388, 43 South. 563, and many other cases might be cited.

No reversible error was committed in sustaining the objections to the defendant's questions to the witness Jack Long. viz.: "Was the dog worth \$5?" "Was the dog worth more than \$10?" This witness testified that he did not know the value of the dog, and, further, that he had no knowledge of value of dogs. In the light of this statement the witness could have made no other answer than that he did not know, unless he

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wished to change his evidence, and there was no offer by the defendant to show this.

There was evidence sufficient to submit the case to the jury, and therefore the general charge requested by the defendant was properly refused. *Mobile & Ohio R. R. Co. v. Glover*, 150 Ala. 386, 43 South. 719.

Affirmed.

SIMPSON, ANDERSON, and SAYRE, JJ., concur.

WHALEN *et al.* v. BALTIMORE & O. R. Co.

(Court of Appeals of Maryland, Jan. 12, 1910.)

[76 Atl. Rep. 166.]

Railroads—Location — Covenants — Continuance—Breach—"Maintain."*—Defendant railroad in May, 1848, covenanted with plaintiffs' predecessors, their heirs and assigns, to construct and maintain a turnout and side track at Dorsey's Run, to take up and set down at the siding by defendant's passenger cars all persons going to and from the farm then occupied by the first parties and to leave at the siding to be unloaded all freight weighing at least 3,000 pounds shipped to the first parties on which the cost of transportation had been paid at the place of loading. Defendant complied with its covenant until 1907, when it constructed a cut-off on its main stem by which a large part of the right of way over plaintiff's land was abandoned, when it discontinued the turnout, and refused longer to maintain a station at that point. Held, that the word "maintain" as used in such covenant did not require defendant to continue the turnout and station permanently, and that the length of time during which the covenant had been complied with constituted a substantial performance thereof, so that the railroad company was not liable for damages for its breach.

Appeal from Baltimore City Court.

Action by Priscilla J. Whalen and others against the Baltimore & Ohio Railroad Company. Judgment for defendant, and plaintiffs appeal. Affirmed.

Argued before BOYD, C. J., and BRISCOE, PEARCE, SCHMUCKER, BURKE, THOMAS, URNER, and PATTISON, JJ.

Edward M. Hammond, for appellants.

Francis Neal Parke and *James A. C. Bond*, for appellee.

*For the authorities in this series on the subject of contracts to build, maintain and operate spur tracks or sidings, see first foot-note of *Whalen v. Baltimore & O. R. Co.* (Md.), 30 R. R. R. 33, 53 Am. & Eng. R. Cas., N. S., 33.

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SCHMUCKER, J. This appeal brings before us for the second time the covenant which constitutes the cause of action in the present controversy. It came here first in a bill for its specific performance in the case of *Whalen v. Baltimore & Ohio Railroad Co.*, reported in 108 Md. 11, 69 Atl. 390, 17 L. R. A. (N. S.) 130. We having declined to grant the relief there asked for, the present suit at law was instituted in the Baltimore City Court to recover damages for an alleged breach of the covenant. The railroad company, as defendant below, demurred to the declaration, and the court sustained its demurrer, whereupon the plaintiffs appealed from the judgment for costs entered on the demurrer.

The declaration alleges that on May 5, 1848, the railroad company by an indenture, of which profert is made, covenanted for the consideration therein mentioned with Thomas B. Dorsey and his wife, their heirs and assigns, "to construct and maintain a turnout and siding at Dorsey's Run on the main stem of said railroad, to take up and set down at said siding by the passenger cars of said company all persons going to and from the farm now occupied by the said parties of the first part and to leave at said siding to be unloaded any car in which any article or articles weighing at least 3,000 pounds shall be laden for said parties and on which the cost of transportation shall have been paid at the place of lading." It is further alleged in the declaration that the plaintiff (appellants) have by mesne conveyances become seised of a large part of the land, owned and seised by the said Dorsey and wife at the time of the execution of the deed of 1848, and are entitled as the assigns of Dorsey and wife to enjoy the benefits of the covenants of that deed. It is then averred that the railroad company from the year 1848 to the year 1907 has been abiding by and performing the covenants of said deed, in that it has been operating its passenger and freight trains over the right of way the deed described, and constructed and maintained a turnout and siding at Dorsey's Run on the line of its main stem, and took up and set down at the siding by its passenger cars all persons going to and from the said farm and delivered there all freight shipped thereto; but in the year 1907 the railroad company constructed a cut-off on its main stem by virtue of which a large part of the right of way over the plaintiffs' land was abandoned, and it discontinued the turnout and siding at Dorsey's Run, and refused, and still refuses, to take up and set down at that place by its passenger cars persons going to or from the farm, and that by reason thereof the plaintiff has sustained great damage in the several respects set forth in the declaration. There is no allegation that the railroad company fraudulently made the cut-off and change of location in their main stem which resulted in the abandonment of the

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structures and stopping place at Dorsey's Run, nor was any such contention made at the hearing of the appeal.

In the suit for specific performance in 108 Md. 11, 69 Atl. 390, 17 L. R. A. (N. S.) 130, we held, upon the authority of many cases then cited, that the covenant now in question constituted a valid contract binding upon the railroad company when entered into and at that time capable of being specifically enforced, and that it ran with the land and inured to the benefit of the plaintiff as an assignee of a portion of the land. We declined to grant the specific performance and also the injunction asked for in that case, because in our opinion the railroad company had the right and power to make the cut-off which it did and the consequent alteration of the line on its main stem "for the purpose of straightening the lines and reducing its grades and thus improving its service to meet its obligations to the public and also to increase its earning capacity for the benefit of its stockholders." We further said, in that connection, that "the very purposes of its creation forbid that it should be tied to the same location forever." We concluded our opinion in that case by saying: "Whether the plaintiffs are entitled to compensation in damages for the abandonment by the defendant of the turnout and siding of train service, so long maintained by the appellee at that place, this court is not now called upon to determine; but we are all of the opinion that the relief prayed for in the bill of complaint must be denied, and that the appellants must be left to seek redress for any injury, which they may have sustained by such abandonment, in a court of law."

Having decided in the equity suit that the covenant was valid, and that it inured to the benefit of the present plaintiffs, we are now called upon to consider whether an abandonment of the turnout and siding at this late day, resulting from a lawful change by the railroad company of the line of its main stem, constituted a breach of covenant for which an action at law for damages will lie. The covenant being a written contract, its construction is a matter for the court.

In order to arrive at the real purpose and meaning of the parties to a contract, the court, according to the accepted canons of construction, considers the language employed, the subject-matter, and the circumstances under which it was made. Considering the language used in the covenant before us, it is to be observed that, while it distinctly provides for the construction and maintenance of the turnout and siding on Mr. Dorsey's land and the stopping of the cars at that point, it is entirely silent as to the duration of the maintenance of those structures or that service. We cannot yield our assent to the contention of the appellant that the word "maintain" ordinarily means to maintain indefinitely or forever. Its meaning in that respect depends upon the context in which it appears and the subject-

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matter to which it relates. There is plainly no specific or positive provision in the covenant touching the duration of the time during which the covenanted acts are to be done or privileges furnished.

In *Texas & Pac. R. R. Co. v. Marshall*, 136 U. S. 393, 10 Sup. Ct. 846, 34 L. Ed. 385, the Texas & Pacific Railroad Company had covenanted, in consideration of the donation to it by the town of Marshall of \$300,000 and 66 acres of land, to establish its eastern terminus at the city of Marshall and to construct there its main machine shops and carworks. In one of the letters by means of which the contract was made, the expression "permanently establish" the terminus, etc., occurred; but in the others the word "permanently" did not appear. The money was paid and the land conveyed to the railroad company, and it established its eastern terminus machine shops and carworks at Marshall, but after having maintained them there for eight years began to remove them to other places. The city of Marshall applied for an injunction to prevent their further removal. The United States Circuit Court, to which the application was made, granted the injunction; but the case was reversed by the Supreme Court of the United States. In the opinion of the Supreme Court, speaking through Justice Miller, after alluding to the fact that the railroad company had established its terminus, machine shop, and carworks at the city of Marshall and maintained them there for eight years, said: "If, however, the city desired something more than this, if it desired to make sure that these establishments should forever remain within the limits of the city of Marshall, and that the railroad company should be bound to keep them there forever, such an extraordinary obligation should have been acknowledged in words which admitted of no controversy. It would have been very easy to have inserted into this contract language which forbade the company from ever removing the terminus of the road to some other point or from ever removing or ceasing to use the depot, or the car and machine shops, and thus have made the obligation perpetual."

In so far as public railway stations are concerned, it was said by us in the recent case of *Md. & Penna. R. R. Co. v. Silver*, 110 Md. 517, 73 Atl. 300: "It has been held in a number of well-reasoned cases that the covenant on the part of a railroad company to erect and maintain a flag station for local trains at a certain place on its line, even if originally valid, is fairly complied with by the erection and maintenance of such a station for a period of years, and until the exigencies of its business, the convenience of the public, and the welfare of the railroad demand its removal. *Texas v. Scott* [77 Fed. 726, 23 C. C. A. 424, 41 U. S. App. 624], 37 L. R. A. 94; *Mobile & O. R. Co. v. People*, 132 Ill. 559 [24 N. E. 643, 22 Am. St. Rep. 556];

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Camp's Case [130 Ga. 1, 60 S. E. 177], 15 L. R. A. (N. S.) 594 [124 Am. St. Rep. 151]; Jefferson Ry. Co. v. Barbour, 89 Ind. 375."

In the case in 108 Md. 11, 69 Atl. 390, 17 L. R. A. (N. S.) 130, we recognized the soundness of the distinction, made in many decisions, between covenants to maintain stations for public convenience and those to establish and maintain sidings, turnouts, crossings, and the like for private use merely. We there said that the former class of covenants are generally condemned as against public policy, while the latter are to be governed by the circumstances of each particular case. The covenant now under consideration not only stipulates to construct a turnout and siding, on the main stem of the railroad, at Dorsey's farm, but also "to take up and set down at said siding by the passenger cars of said company all persons going to and from the farm," and also to receive and deliver freight at that point under the conditions therein mentioned. The provision for stopping its passenger cars at the farm for all persons going to or from it comes very close to an agreement for establishing a public station of the kind involved in Silver's Case, in 110 Md. 510, 73 Atl. 297.

In our opinion such a covenant as that, when it contains no stipulation for maintaining the structures or stopping the trains either in perpetuity or during a specified period, should, in view of the well-known scope and purpose of a public service corporation like a railway company, be presumed to have been made subject to the exigencies of the company's further development and needs. As was said in the case of Texas & Pacific Railway Company v. Scott, 77 Fed. 726, 23 C. C. A. 424, 41 U. S. App. 624, 37 L. R. A. 94: "It cannot be true that an agreement on the part of a railway company to establish a station at a particular point is an agreement to keep it there forever. It must be that such an agreement is made subject to the general exigencies of business, the public interests, and to the change, modification, and growth of transportation routes, as these may affect the requirements of the railway company's business. The contract having this limitation, we think that the establishment of a railway station and its maintenance to the full extent claimed or expected for 36 years is, under all the circumstances, a substantial and sufficient compliance with the terms of the contract relied on here."

When, in a case like the present one, after the company has maintained the structures and stopping place agreed on for more than 59 years, it becomes necessary or desirable for the promotion of better public service to so alter the location of its roadbed as to no longer pass the place mentioned in the covenant, and the change is made in good faith, we think the previous maintenance of the structures and stopping place should be regarded

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as a substantial performance of the covenant, and be held sufficient to discharge the company from further liability thereunder. Eight years' maintenance of a terminus, shops, and carworks, in Marshall's Case, *supra*, to amount to a performance of the covenant. Seventeen years' maintenance of a public station until "the exigencies of business, the convenience of the public, and the welfare of the railroad" demanded its removal, was held by us, in the recent case of Md. & Penna. R. R. Co. v. Silver, *supra*, to constitute a fair compliance with a covenant to make and maintain a passenger and freight station on a specified lot of land conveyed to it for that purpose.

In the case of Mead v. Ballard, 74 U. S. 290, 19 L. Ed. 190, the ancestor of Mead conveyed in 1847 a tract of land in Wisconsin by a deed containing the following language: "Said land being conveyed upon the express understanding and condition that the Lawrence Institute of Wisconsin chartered by the Legislature of said territory shall be permanently located on said lands." And further provided that on the failure of such location being made within a year thereafter the land should on the repayment of the purchase money revert to the grantors. The institution was located upon the lands within the specified time, and its buildings were erected thereon. About 10 years thereafter the buildings burned down and were never rebuilt; but a larger and better set of buildings were erected on an adjoining lot of land. Mead, the heir of the grantor, thereupon tendered the purchase money and demanded a reconveyance of the land, and upon the refusal of his demand brought suit. It was held in that case that, when the trustees of the institute by resolution located it on the land and erected its buildings thereon, the contract was complied with. It was further held that the use of the word "permanently" in the condition in the deed did not require them to rebuild the burned buildings, and that the title to the land was not forfeited by the failure to do so. That case was in part decided upon the fact that by the terms of the deed the institute was to be located on the land within a year, and that it therefore meant something that could be done in a year; but it is cited and relied on by the Supreme Court in the Marshall Case.

In view, then, of the absence from the covenant sued on in this case of any stipulation for the maintenance in perpetuity of the structures and service therein contracted for, and also in view of the very long time for which they were in fact maintained, and the nature of the event which caused their ultimate abandonment, we are of the opinion that there was no error in the action of the learned judge below in sustaining the demurrer, and we will affirm the judgment appealed from.

Judgment affirmed, with costs.

ST. LOUIS SOUTHWESTERN RY, CO. *v.* MACKEY.

(Supreme Court of Arkansas, May 30, 1910.)

[129 S. W. Rep. 78.]

Waters and Water Courses—Obstruction of Flowage—Duty of Railroad Company.*—Where a railroad builds across or alters the natural drainage of land, it must make suitable provision, not only for the escape of the ordinary flow of water, but also for carrying off the waters of extraordinary freshets, which can reasonably be foreseen.

Negligence—Concurrent Causes—Act of God.||—Where two concurring causes produce an injury which would not have resulted in the absence of either, the party responsible for one cause is liable for the consequent injury, though the other cause is the act of God.

Water and Water Courses—Temporary Obstruction of Flowage—Damages.—Where the defective manner in which a railroad company has constructed and maintained openings in its roadbeds for draining adjoining land is only temporary, and can and will be remedied, the measure of damages is the diminished or rental or usable value of personal property thereon thereby destroyed and the diminution in value of that only damaged.

Appeal from Circuit Court, Craighead County; N. F. Lamb, Special Judge.

Action by J. P. Mackey against the St. Louis Southwestern Railway Company. Judgment for plaintiff. Defendant appeals. Affirmed.

S. H. West and *J. C. Hawthorne*, for appellant.

J. F. Gantney, for appellee.

FRAUENTHAL, J. This was an action instituted by J. F. Mackey, the plaintiff below, to recover damage which he alleged was done to his personal and real property by water which it is claimed was wrongfully and negligently diverted from and obstructed in its natural flow and cast upon plaintiff's property. The plaintiff was the owner of two lots in the city of Jonesboro, upon which were located a storehouse and his dwelling house. The lots were situated on the south side of the defendant's railroad, and about 75 feet from its roadbed. At this place the

*See foot-note of *Western Maryland R. Co. v. Martin* (Md.), 33 R. R. R. 397, 56 Am. & Eng. R. Cas., N. S., 397; *St. Louis, etc., Ry. Co. v. Walker* (Ark.), 33 R. R. R. 46, 56 Am. & Eng. R. Cas., N. S., 46; *Alabama & M. R. Co. v. Beard* (Miss.), 33 R. R. R. 41, 56 Am. & Eng. R. Cas., N. S., 41; *Blunck v. Chicago & N. W. Ry. Co.* (Iowa), 33 R. R. R. 24, 56 Am. & Eng. R. Cas., N. S., 24.

†See last foot-note of *Briggs v. Durham Traction Co.* (N. Car.), 30 R. R. R. 324, 53 Am. & Eng. R. Cas., N. S., 324.

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natural flow of the water was from a southerly direction and across the defendant's road. Prior to the year 1907 the defendant had constructed and maintained two openings or culverts through its roadbed, and the testimony on the part of the plaintiff tended to prove that these two openings allowed the water that was accustomed to fall upon and drain over the land at this place to pass through the roadbed, and successfully carried it off. One of these openings or culverts was located in front of plaintiff's property, and the other opening was located about 150 yards east thereof. About 1907 the defendant constructed a switch along the side of its main track at this place, and in doing so built a dump, which widened the original roadbed. In building this dump it closed the opening or culvert in the roadbed to the east of plaintiff's property, and from that point it dug a ditch along the south side of its roadbed to the opening or culvert which was situated in front of plaintiff's property; but it did not increase the size of this opening. It thus diverted the water which prior to that time had been used and accustomed to flow east of the plaintiff's property, and caused it to drain to the opening in front of his property. The testimony on the part of the plaintiff tended to prove that this opening or drain was not sufficient to carry off the waters that ordinarily fell upon and drained over the land at this place during ordinary rains; that the natural flow of the water was thereby impeded during ordinary rains, and was cast back upon the land of the plaintiff, and greatly damaged it, and materially and substantially lessened the use and enjoyment of his property for a number of months during each year from that date up to the time of the institution of this suit. In February, 1907, a great and unprecedented rain fell, which flooded the portion of the city of Jonesboro in which plaintiff's property was situated. The testimony tended to prove that waters from these rains were greatly impeded and obstructed by the insufficiency of the opening in defendant's roadbed, and that they were cast back upon the plaintiff's property. From this cause the waters rose to a considerable height in the dwelling house and store. It injured materially the use and enjoyment of the property and it destroyed a part of and damaged a considerable portion of a stock of groceries and other goods which plaintiff carried in his store. Upon a trial of the case the jury returned a verdict in favor of plaintiff, assessing the damage to the rental or usable value of realty at \$200, and to the personal property at \$150; and from the judgment entered upon the verdict the defendant has appealed to this court.

It is the right of each proprietor along a natural drain or water course to insist that the water shall continue to flow as it has been used and accustomed to do; and when its natural course has been obstructed or changed so as to injure him, it is his right

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to recover recompense for the damages he has thereby sustained. It is the duty of a railroad company to so construct and maintain its roadbed as to cause no injury that could have been avoided by proper care and skill; and where such roadbed will obstruct and impede the natural flow and drainage of the water it becomes its duty to make sufficient openings for the passage of the water. In the case of *Railway Company v. Cook*, 57 Ark. 387, 21 S. W. 1066, its duty and liability is thus expressed: "It is the duty of a railroad company to provide proper and sufficient openings or culverts for the escape of the water of all streams crossing its roadbed, so as not to flood the land of upper riparian owners, whether at ordinary stage of water or during floods which could reasonably have been foreseen and guarded against; and if it fails to provide such openings it is liable to any person damaged thereby." If the railroad company builds across or alters the natural drainage of land, it must make suitable culverts, bridges, or other provisions for effectually carrying off the water. The law exacts the exercise of this care and diligence on the part of the railroad company, not only for the escape of the ordinary flow of such water, but where it could reasonably have been foreseen to make suitable provision to carry off the water of extraordinary freshets. For a failure to exercise that care and diligence the railroad company will be liable to those who are damaged thereby. *St. L., I. & R. Co. v. Anderson*, 62 Ark. 360, 35 S. W. 791; *L. R. & Ft. S. R. Co. v. Chapman*, 39 Ark. 463, 43 Am. Rep. 280; *Bentonville R. Co. v. Baker*, 45 Ark. 252; *Angell on Water Courses* (7th Ed.) 465b; *Pierce on Railroads*, p. 203.

But it is urged that the rains which occurred in February, 1907, were so unprecedented, and the flood caused thereby so extraordinary, that it was in legal contemplation the act of God, for which the defendant should not be held liable. The defendant cannot be held liable for damage caused by the act of God. If the rains and flood in February were of such an overwhelming and destructive character as by their force, and independently of any other real, efficient cause, to produce the injury, then there would be no liability against the defendant. But if the injury was produced by the combined effect of the act of God and the concurring negligence of defendant, then it would be liable therefor. Where two concurring causes produce an injury, which would not have resulted in the absence of either, the party responsible for either cause is liable for the consequent injury; and this rule applies where one of the causes is the act of God. This court in *City Electric St. Ry. Co. v. Conery*, 61 Ark. 381, 33 S. W. 426, 31 L. R. A. 570, 54 Am. St. Rep. 262, announced this rule, as stated in the syllabus: "The concurring negligence of two parties makes both liable to a third party injured thereby; if the injury would not have occurred from the

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negligence of one of them only." Wharton on Neg. (2d Ed.) 144; 1 Shear. & Redf. Neg. (4th Ed.) § 39; St. L., I. M. & S. R. Co. v. Coolidge, 73 Ark. 122, 83 S. W. 333, 67 L. R. A. 555, 108 Am. St. Rep. 21; Southwestern Tel. & Tel. Co. v. Bruce, 89 Ark. 581, 117 S. W. 564; C., R. I. & Pac. R. Co. v. Miles, 123 S. W. 775. The act of God which excuses must be, not only the proximate cause, but the sole cause. And where the act of God is the cause of the injury, but the act of the party so mingles with it as to be also an efficient and co-operating cause, the party will be still responsible. In 1 Shear. & Redf. Neg. (4th Ed.) § 39, the rule is thus stated: "It is universally agreed that if the damage is caused by the concurring force of the defendant's negligence and some other cause, for which he is not responsible, including the act of God, * * * the defendant is nevertheless responsible if his negligence is one of the proximate causes of the damage." Vyse v. Chicago, B. & Q. Ry. Co., 126 Iowa, 90, 101 N. W. 736.

The lower court gave a number of instructions, some of which counsel for defendant claims were erroneous. We have examined all the instructions, and we do not think that the court committed any prejudicial error in its ruling on any of them. They, in effect are in conformity with the above principles, and we do not think that it would serve any useful purpose to set them out, or to discuss them in detail. We are also of the opinion that there was sufficient evidence to warrant the verdict of the jury. The testimony proved that the defendant, by closing the eastern culvert through its roadbed, had diverted waters to the opening in the roadbed in front of plaintiff's property. This latter opening was insufficient to allow the passage of the waters that ordinarily were accustomed to drain and flow across the roadbed at this place; and the negligence of the defendant in not making a sufficiently large opening at this place and at other reasonably necessary places through its roadbed was an active cause that obstructed and impeded the flow of the water in times of extraordinary freshets, so as to cast it back and flood the property of plaintiff. We also think that the jury were warranted in finding that the defendant could reasonably have foreseen the coming of these extraordinary rains, and could reasonably have so constructed its roadbed as to permit the waters to pass without the damage which was incurred by plaintiff.

It appears to be conceded by both parties that the manner in which the defendant has constructed and maintained culverts or openings through the roadbed is only temporary, and can and will be remedied, and that the injury is not, therefore, permanent. The measure of damages in such case was the diminished rental or usable value of the land, and the market value of the personal property destroyed, and the diminished value of that which was damaged. Railway Co. v. Cook, 57 Ark. 387, 21 S.

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W. 1066; *Czarnecki v. Bolen-Darnell Coal Co.*, 120 S. W. 376; *Junction City Lbr. Co. v. Sharp*, 123 S. W. 370. The court properly instructed the jury as to the measure of damages, and we think that there is some testimony to sustain the jury in the amount of the damages which they found. The verdict of the jury should not, therefore, be disturbed.

The judgment is affirmed.

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(Supreme Court of Missouri, Division No. 1, Dec. 23, 1909. Rehearing Denied March 1, 1910.)

[126 S. W. Rep. 159.]

Abatement and Revival—Actions—Interposition of Guardian—Effect.—Where a guardian for plaintiff, who became insane pending suit, was allowed to interpose in the case in his behalf, it did not displace his ward as plaintiff, and there was no abatement and revivor; the ward, and not the guardian who represents him, being the plaintiff.

Insane Persons—Title to Property.—An insane person retains title to his property, and it does not vest in his guardian or curator.

Insane Persons—Actions—Judgment.—If an insane person is sued, the court will appoint a guardian ad litem or other suitable representative, but a judgment against defendant would not be against such guardian, but against the insane person.

Constitutional Law—Legislative Powers—Encroachment on Judiciary.—Jurisdiction given to the courts by the Constitution cannot be taken away or curtailed by the General Assembly, but it may prescribe the mode of procedure by which it is to be exercised.

Insane Persons—Appointment of Guardian—Jurisdiction.—Jurisdiction of the probate court to appoint a guardian for an adult person after ascertaining his insanity necessarily carries jurisdiction to inquire as to his mental condition.

Insane Persons—Guardians and Curators—Grounds of Appointment.—An insane person needs a guardian of his person even though he have no property, but a curator only is needed where there is property to be protected.

Constitutional Law—Legislative Powers—Encroachment on Judiciary.—Const. art. 6, § 34 (Ann. St. 1906, p 238), having conferred on the probate court jurisdiction over all matters pertaining to the appointment of guardians and curators of persons of unsound mind without limiting its jurisdiction to cases in which such a person owns property, the proviso added by Acts 1903, p 200, to Rev. St. 1899, § 3650 (Ann. St. 1906, p. 2060) prescribing the procedure, providing

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the court shall not have jurisdiction to inquire into the insanity of one not owning property, is unconstitutional.

Depositions—Suppression—Mental Incapacity of Deponent.—Where a deponent's mental capacity to give testimony is an open question on the evidence, it bears on the weight to be given to his testimony, but does not require the suppression of his deposition

Depositions—Suppression—Mental Incapacity of Deponent—Evidence—Sufficiency.—Evidence as to plaintiff's mental incapacity to testify held insufficient to show that it was so obvious as to justify the court in suppressing his deposition on that ground.

Depositions—Suppression—Disqualification of Notary.—That the notary who took a plaintiff's deposition was a partner with one of plaintiff's attorneys in the business of insurance agents is good ground for its suppression, if the objection is made in time.

Depositions—Officer Taking—Judicial Capacity and Discretion.—A notary taking a deposition to be used as evidence in a pending case acts in a judiciary capacity, and should be entirely disinterested, and, not only in taking down the questions and answers, but in the whole course of the proceedings, he should exercise a judicial discretion.

Depositions—Impeachment—Unfairness and Partiality of Notary.—If a notary fails to take a deposition as fairly and impartially as a judge on the bench, it may be impeached.

Depositions—Suppression—Disqualification of Notary.—Where a notary taking a deposition appears to have acted fairly, and correctly reported all the proceedings before him, and one of the attorneys for defendant who was present knew he was a business partner of an attorney for plaintiff, but made no objection on that ground, the court properly refused to suppress the deposition on account of the notary's partnership relation.

Depositions—Introduction in Evidence—Waiver of Objections.—An objection to the form of a question to a deponent as being leading is waived unless made before the officer taking the deposition.

Master and Servant—Injury to Railroad Employee—Contributory Negligence.*—A railroad employee, injured while at work in switching cars under the immediate supervision of a yard master, had a

*For the authorities in this series on the subject of the right of a railroad employee to assume that his master or his representative has performed—or will perform its duties to him, see foot-note of *McConnell v. Pennsylvania R. Co.* (Pa.), 34 R. R. R. 84, 57 Am. & Eng. R. Cas., N. S., 84; 24th head-note of *Vaillancourt v. Grand Trunk Ry. Co.* (Vt.), 33 R. R. R. 353, 56 Am. & Eng. R. Cas., N. S., 353.

For the authorities in this series on the subject of the contributory negligence of railroad employees injured by structures or objects over or near tracks, see first foot-note of *Norfolk & W. Ry. Co. v. Beckett* (C. C. A.), 29 R. R. R. 795, 52 Am. & Eng. R. Cas., N. S., 795; last foot-note of *McDuffee's Adm'x v. Boston & M. R. R.* (Vt.), 29 R. R. R. 467, 52 Am. & Eng. R. Cas., N. S., 467.

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right to trust that the latter had done his duty by placing cars on a side track far enough from the main track to allow him to safely pass standing on a ladder on the side next to them; and, though he saw the cars standing there, he was not obliged to measure the distance.

Master and Servant—Action for Injuries—Questions for Jury.—In an action against a railroad by an injured employee, who struck against a car on a side track as he stood on a ladder of a car being switched, evidence held to present questions for the jury as to negligence, contributory negligence, and assumption of risk.

Master and Servant—Safe Place to Work—Transitory Danger.—Where the master furnishes his servants a reasonably safe place to work, he is not liable for a transitory danger arising out of a single occurrence in which he is not at fault, and of which he has no notice or opportunity to correct.

Appeal and Error—Harmless Error—Instructions.—Where, in an action against a railroad by an injured employee, who struck against a car on a side track as he stood on the ladder of a car being switched, it appeared the yard master, under whose immediate supervision plaintiff was at work, was present and saw the situation, which was easy to correct, if dangerous, an instruction based on the supposition that defendant had negligently permitted or suffered the car to remain there for a long period of time, where the evidence showed it was for only a few hours, and the car was to be soon moved, was harmless error, as there was no question as to defendant's knowledge of the danger, and the time the car remained on the side track did not render it more dangerous or more liable to produce the accident.

Master and Servant—Safe Place to Work—Dangerous Condition—Duration Thereof—Effect.—The significance of the fact that a dangerous condition is suffered to remain a long time is that it indicates the master had notice of it, but when there is no question about his knowledge, the duration of the condition is immaterial.

Master and Servant—Action for Injuries—Instructions—Contributory Negligence.—In an action against a railroad by an injured employee, who struck against a car on a side track as he stood on the ladder of a car being switched, the court charged that, if the jury found that plaintiff was exercising ordinary care in riding on the ladder in the way and at the time aforesaid, and was not guilty of any contributory negligence on his part, contributing directly to produce such injury, he might recover. Another instruction defined negligence and ordinary care, and stated that, if plaintiff himself was negligent, and such negligence directly contributed to his injury, he could not recover, that it was his duty to exercise for his own protection the care usually exercised by careful persons under like circumstances, and if he failed to do so, and such failure was the cause of or contributed to the injury, the jury should find for de-

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fendant. Held, that the defense of contributory negligence was fairly given to the jury.

Appeal and Error—Review—Point Not in Brief.—A point made on a motion for a new trial will not be considered on appeal, where appellant makes no such point in his brief.

Appeal from Circuit Court, Caldwell County; J. W. Alexander and Frank H. Trimble, Judges.

Action by Fred Redmond, by his guardian, John Redmond, against the Quincy, Omaha & Kansas City Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

O. J. Chapman, H. T. Herndon, and J. G. Trimble, for appellant.

Pross T. Cross, John A. Cross, R. H. Musser, John A. Clark, and John C. Carr, for respondent.

VALLIANT, J. Plaintiff in his petition avers that he was a switchman and brakeman in the employ of the defendant railroad company; that while he was engaged in the performance of his duty as such, in defendant's switchyard at Milan, on January 11, 1903, standing on the ladder on the side of a car that was being switched, he was struck against another car that was standing on a side track, knocked off, thrown to the ground, and received severe personal injuries, for which he sues to recover damages. The trial resulted in a judgment in plaintiff's favor for \$10,000, from which the defendant appealed.

The petition alleges four grounds of negligence: First, that by negligently placing, and suffering to remain, the car on the side track in such dangerous proximity to the track on which was the car plaintiff was riding as to strike the plaintiff, the track and yards were rendered not a reasonably safe place for plaintiff to work in; second, defendant's servants in charge of the engine drawing the car on the ladder of which plaintiff was standing saw, or by the exercise of reasonable care would have seen, the dangerous proximity of the car on the side track, and knew plaintiff's position on the ladder and the danger that threatened, yet failed to warn him; third, that seeing and knowing the danger to which plaintiff was so exposed, the defendant's servants in charge of the engine ran it at a dangerous and unsafe rate of speed; fourth, that the switchyard was not properly lighted.

The original petition was filed in the name of Fred Redmond, plaintiff. It was filed December 9, 1905, and on December 18, 1905, his deposition was taken in his own behalf at Lathrop, Clinton county. On April 11, 1906, one John Redmond, the father of Fred, filed in the probate court of Clinton county an affidavit alleging that Fred was of unsound mind, caused by the injuries received in this accident, and praying an inquisition de

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lunatico be instituted. Thereupon notice to Fred was issued and served the same day, and two days later, April 13th, the inquisition was held, he was found to be insane, so adjudged, and John Redmond was appointed guardian of his person and curator of his estate, and required to give bond in the sum of \$100, which he did, and was in due form qualified as such guardian and curator. On the same day, April 13th, John Redmond filed a motion in the form of a petition, in the circuit court of Clinton county, in this cause, stating that Fred Redmond, although sane when he instituted this suit, had since become insane and incapable of conducting the suit, that John Redmond had been duly qualified as his guardian, and prayed to be made a party plaintiff. Defendant objected to having the cause revived in the name of the alleged guardian, particularly at that time, for the reason that defendant was not in court for that purpose, there having been no scire facias issued against it. The objections were overruled and exceptions saved. John Redmond, as guardian, was then allowed, over the defendant's objection, to amend the original petition by interlining in the caption thereof, after the name "Fred Redmond," the words "by his guardian, John Redmond," and in the body of it a statement to the effect that, although Fred was sane when the suit was begun, yet he had since become insane, and John Redmond had been appointed his guardian. In other respects the petition was left as original. Defendant preserved all its exceptions to that proceeding in a term bill of exceptions filed at the time. After that a change of venue was granted to defendant to Caldwell county, and the cause was transferred to the Caldwell circuit court. On the first day of the next term of the Caldwell circuit court defendant filed a motion to dismiss the cause because, first, if Fred Redmond has become insane since the commencement of this suit, as stated in the amended petition, the cause has not been properly revived, and John Redmond is not a proper party; and, second, the probate court of Clinton county had no jurisdiction to hold an inquest or to appoint a guardian for Fred Redmond, because he had no property. To sustain its motion the defendant introduced in evidence the petition of the plaintiff to the Clinton circuit court for leave to sue as a poor person, in which it is stated that he "has no money or property whatever." Also the record of the probate court in the matter wherein the inquisition was held and the guardian and curator appointed which showed that Fred Redmond had nothing in the way of property but this suit for damages. The court overruled the motion to dismiss, and exception was duly saved. After that proceeding the defendant filed its answer to the amended petition, in which, after admitting its incorporation, he denies all other allegations, makes special denial that John Redmond was legally appointed guardian; also makes special denials of some allegations that are

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sufficiently traversed by its general denial. Then the answer pleads, as contributory negligence on the part of the plaintiff, that if the car on the side track was a danger menacing the plaintiff's safety, plaintiff knew it was there, had frequently passed it, and had himself put it in that position, and if there was any risk on account of defective lights, it was obvious, and plaintiff was well aware of it. The answer also pleads a contract entered into by plaintiff with defendant on the occasion of his employment, to the effect that he released the railroad company from liability for injuries he might receive through the negligence of plaintiff's fellow servants; also a contract reciting to the effect that he was instructed, when he entered into the employment, that it was dangerous, and that he assumed the risk. The reply was a general denial and a plea that the contracts pleaded in the answer were in violation of section 2876, Rev. St. 1899 (Ann. St. 1906, p. 1657).

1. As to allowing John Redmond as guardian to interpose in the case. The point is discussed on both sides as if John Redmond as guardian was substituted for Fred Redmond as plaintiff; it is also considered in the brief of defendant as if by the action of the court the cause was revived in the name of the guardian. But there has been no displacement of Fred Redmond as plaintiff, no abatement, and no revivor. John Redmond as guardian is not the plaintiff; it is Fred Redmond, plaintiff, represented by John Redmond, his guardian. The title to the property of an insane person does not vest in the guardian or curator, but it remains in the insane person; the guardian or curator having only the care and control of it. The judgment in this case is not a judgment in favor of John Redmond, guardian, but it is a judgment in favor of Fred Redmond. If a plaintiff die pending a suit, the cause must be revived in the name of his administrator, and on suggestion of death scire facias must issue, but that proceeding has no place in a suit where the plaintiff becomes insane. If an insane person is sued, the court will appoint a guardian ad litem, or other suitable representative, to guard his interest; but, if a judgment against the defendant were rendered, it would not be a judgment against the guardian ad litem, but against the insane person. It has been held by this court that a suit could be maintained in the name of an insane person not in award. *Allen v. Ransom*, 44 Mo. 263, 100 Am. Dec. 282; *Koenig v. Union Depot Co.*, 194 Mo. 564, 92 S. W. 497. But where a guardian has been regularly appointed, the duty devolves on him to attend to the suit for his ward. Section 3667, Rev. St. 1899; Ann. St. 1906, p. 2063; *Hays v. Miller*, 81 Mo. 424.

Defendant complains that by first instituting the suit in the plaintiff's own name and on his own responsibility, then immediately taking his deposition, and, before the cause could

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come on for trial, going into the probate court and having him declared insane, and a guardian appointed, discloses a scheme to avoid bringing the plaintiff into court, where the worth of his testimony could be considered by the court and jury. And force is given to that complaint by the fact that there was no eyewitness to the accident, and the only testimony tending to show that the plaintiff was struck by a car on the side track was his own testimony in that deposition, and his evidence on that point came out mainly in answers to leading questions, whilst there was a good deal of evidence of circumstances tending to the contrary. But whilst that fact tends to weaken confidence in the correctness of the verdict, and does not justify an appellate court in saying that the judgment is so clearly for the right party that in spite of some errors it ought to be sustained, yet it cannot affect the question of law as to the admission of the guardian to manage the litigation.

The General Assembly in 1903 passed an act amending section 3650, Rev. St. 1899, by adding thereto this proviso: "Provided that the probate court shall not have jurisdiction to inquire into the insanity of any person who is the owner of no property." Acts 1903, p. 200 (Ann. St. 1906, p. 2060). The record in this case shows that Fred Redmond owned no property. A claim for damages in an action in tort is not property within the meaning of that act. Therefore, if the act of the General Assembly is valid, the probate court had no jurisdiction to institute the inquisition de lunatico, or appoint a guardian. But in passing that act the General Assembly doubtless overlooked section 34, art. 6, of the Constitution (Ann. St. 1906, p. 238), which is as follows: "Sec. 34, Probate Courts. The General Assembly shall establish in every county a probate court, which shall be a court of record, and consist of one judge, who shall be elected. Said court shall have jurisdiction over all matters pertaining to probate business, to granting letters testamentary and of administration, the appointment of guardians and curators of minors and persons of unsound mind, settling the accounts of executors, administrators, curators and guardians, and the sale or leasing of lands by administrators, curators and guardians; and also jurisdiction over all matters relating to apprentices: Provided, that until the General Assembly shall provide by law for a uniform system of probate courts, the jurisdiction of probate courts heretofore established shall remain as now provided by law." By that section full jurisdiction is conferred on probate courts to appoint guardians and curators for persons of unsound minds. What the Constitution has given the General Assembly cannot take away or curtail. The Constitution does not limit the jurisdiction of the probate court to cases in which the insane person owns property, but the jurisdiction is over all such persons. The probate court cannot ap-

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point a guardian of an adult person until it has ascertained that he is insane, and jurisdiction to appoint the guardian necessarily carries the jurisdiction to institute and carry through the inquiry as to his mental condition. An insane person needs a guardian of his person even though he have no property; a curator is needed only when there is property or property interests to be protected. Where jurisdiction is conferred by the Constitution the General Assembly has power to prescribe the mode of procedure in which that jurisdiction is to be exercised, and so it has done by the enactment of section 3650, Rev. St. 1899, prescribing the course to be pursued by the probate court in such case, but the proviso aimed to be added to that section by the act of 1903 is not the prescribing of a procedure, but a curtailment of the jurisdiction which the Constitution conferred. We hold that the act of the General Assembly, entitled "An act to amend section 3650, chapter 39 of the Revised Statutes of Missouri, 1899, entitled 'Insane Persons,'" approved March 25, 1903, is unconstitutional. It follows, therefore, that the judgment of the probate court of Clinton county appointing John Redmond guardian of Fred Redmond is valid.

2. Before reaching the facts of the case it may be as well to consider another preliminary matter. When the cause was lodged in the Caldwell circuit court defendant filed a motion to suppress the deposition of the plaintiff on the grounds that he was insane when the deposition was taken, and the notary who took it was a partner of one of the attorneys for the plaintiff; he was not a law partner, but a partner with the attorney in the business of insurance agents. As to the first ground, there was evidence tending to show that the man was insane. He had been an inmate of the lunatic asylum at St. Joseph. During the taking of the deposition he was attended by a physician, and several times the proceeding had to be suspended to allow him to get out in the open air and recover his nerves, but up to that time there had been no adjudication of his insanity. Therefore whether or not he had sufficient mental capacity to give testimony in the case was an open question, and the evidence on that point bore on the question of the weight to be given to his testimony. There was sufficient evidence to justify the defendant in contending before the jury that the testimony was unreliable on account of mental incapacity, and at defendant's request the court instructed the jury on that point that, if they believed from the evidence that when the plaintiff gave his deposition he "was feeble-minded and mentally unbalanced, then they will take such fact into consideration in weighing his evidence and in determining what credit they will give his testimony in the case." We do not think the plaintiff's mental incapacity as shown by the evidence was so obvious as to have justified the court in suppressing the deposition on that ground. As to the

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second ground, that the notary was a partner of one of the attorneys, we think that would have been good ground to suppress the deposition if timely objection had been made. A notary taking a deposition to be used as evidence in a cause pending in court acts in a judicial capacity, and should be entirely disinterested. *Swink v. Anthony*, 96 Mo. App. 420, 70 S. W. 272. Not only in taking down the questions and answers, but in the whole conduct of the proceeding, the notary should exercise a judicious and a judicial discretion. In a case like this, for instance, if a witness should appear before a notary in a condition from which the notary becomes satisfied that he is not responsible for what he may say, an intelligent and impartial notary will refuse to take his deposition. A conscientious and intelligent notary will conduct the taking of a deposition as fairly and impartially as a judge on the bench, or if he should fail to do so, the deposition may be impeached. In the case before us, however, there is no charge made that the notary acted unfairly in any respect. And it does appear that one of the attorneys for defendant who was present knew that the notary was a business partner of one of the attorneys for the plaintiff, but he made no objection to the notary on that ground. If such objection had been made and overruled, the deposition should have been suppressed. It also appeared in evidence on the hearing of this motion that the attorneys for defendant had present a stenographer who took down all the proceedings, and there was no variance between his report and that of the notary. The court did not err in overruling the motion to suppress.

3. While we are on the subject of the deposition we will consider the objections to certain parts of it that were made when it was offered in evidence at the trial. Those objections were on the ground that the questions were leading, and that the answers were suggested by the questions. The questions indicated are leading, but there was no objection interposed at the time before the notary on that ground. An objection to the mere form of a question is waived unless made before the notary at the time it is propounded; in that respect it differs from an objection on the ground of incompetency, for if the testimony drawn out before the notary is incompetent, the objection may be made for the first time when the deposition is offered in evidence.

4. The testimony on the part of the plaintiff tended to show as follows: He was a switchman and brakeman in the employ of defendant in its switchyard at Milan. The yard lies north and south, the larger part of it being south of the depot, and in that part there are several switch tracks running off from the main line, but they are only incidentally mentioned in the evidence. The main track runs north and south through the yard. Coming up the main track from the south when you reach the north end of the yard a switch track turns off to the east; it

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is called the River track. Further north, probably 80 feet, another track turns off to the west; it is called the Kansas City track. On the night of January 11, 1903, about 11 o'clock, plaintiff, as one of a switching crew, was engaged in switching cars from the main track to the Kansas City track. The train, consisting of an engine headed north drawing two box cars and a caboose, was coming from the southern end of the yard. They were aiming to make a flying switch; that is, to gain such momentum as that, when the coupling with the engine was severed, the cars would move onto the Kansas City track, where they were to be placed. The engine was going 25 to 30 miles an hour, which was faster than usual. In the performance of his duty in that particular, when the train reached the proper distance from the switch of the Kansas City track, plaintiff drew the coupling pin, and signaled the yard master, who, as soon as the engine had passed, threw the switch to let the cars into the Kansas City track. The point where the plaintiff drew the coupling pin and gave the signal was just north of the River track switch. As soon as he drew the pin, he began to climb the ladder on the east side of the front box car, for the purpose of getting on top and setting the brake, and while in that act, his body came in violent contact with a car standing on the River track. He was thrown to the ground and knocked senseless. He testified that he did not see the car on the River track until it was too late to avoid it, did not know it was there, and did not know who put it there; that there was no light in the yard at that point except his lantern. The injuries received by the plaintiff were very serious and distressing.

The testimony on the part of defendant tended to show as follows: There had been some cars placed on the River track during the day, just how many or where the evidence is not definite, but they were placed there to make up a train to go east that night. The crew to which Redmond belonged came on duty at 7 o'clock in the evening, and were engaged switching cars until about 9:30, during which time they brought cars from the south part of the yard and switched them onto the River track. In doing so they passed the cars that had been placed on the River track during the day several times. Redmond rode the cars in, set the brake, and gave the signal to the engineer when to stop. The engineer testified that during that time he passed the cars several times, and observed that the cars cleared the cab of the engine at least two feet. The crew quit work at 9 o'clock, and went to the depot to await the coming in of a train which they called "Gilbert's train." After that train came and had been inspected, it was reported as ready to be "broken up," and the crew again went to work taking cars from that train and placing them on the River track; Redmond riding the cars in and setting the brakes. It is to be inferred from this evidence

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that in making these switches they went further north on the main line, and entered the River track from the north end, else they would not have passed the cars already stationed on the River track. After doing that work the crew went to the south end of the yard and got these two box cars and caboose, in the setting of which on the Kansas City track this accident occurred. The yard master testified that when they approached the Kansas City switch he went forward to the switch so as to be in place to throw it; Redmond took his place near the front end of the car next the engine to be ready to uncouple the engine from the cars; he drew the coupling pin, gave the signal, and then began to climb the latter to get on top to set the brake when the flying switch should be made. At the time Redmond began to climb the ladder the front end of the car was near the River track switch, and he was about halfway up the ladder when the yard master last saw him; the engine, being cut loose, went on up the main track, while the cars were carried by their momentum onto the Kansas City track. They stopped at the place intended. The yard master did not see Redmond again until he saw his unconscious body lying between the main track and the River track near the north end of the first car on the River track. The engineer testified that when he came back Redmond was lying between the River track and the main track, just west of the cars that were on the river track. There had been a light snowfall that night, covering the ground and the tops of the cars. One of defendant's witnesses, the telegraph operator, who when he heard of the accident came up to assist, testified that the plaintiff was lying on the west side of the Kansas City track, but all the other witnesses for defendant testified that he was east of the main track, and between it and the River track. There was some confusion in the evidence as to the points of the compass; the yard lay north and south, but the witnesses sometimes call the north the east, and the south the west, though when their attention was called to it they gave the correct compass points.

There was expert testimony on the part of defendant tending to show that the plaintiff did not have mental capacity at the time he gave his deposition to recollect or state how the accident occurred.

a. At the close of the plaintiff's evidence, and again at the close of all the evidence, defendant asked an instruction in the nature of a demurrer to the evidence, which the court refused, and exceptions were saved, and appellant now insists that those instructions should have been given. Appellant's contention is that the undisputed circumstances in the case show that it was impossible for the accident to have occurred as plaintiff testified that it did occur. Defendant's theory is that Redmond had climbed to the top of the car, set the brake, and from some

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cause, probably the loose snow on top of the car, had slipped, and that he fell from the top of the car. In support of this theory it is contended that as he began climbing the ladder just after the car had crossed over the River track switch, which was 80 feet south of the Kansas City switch, he had ample time in which to have climbed to the top of the car and set the brake before he reached the point where he was found on the ground, and the cars having stopped at the point where it was aimed to have them stop shows that the brake was set. And also that, if he had been struck while he was on the ladder by a car on the River track, he would not have fallen where he was found—that is, near the north end of the first car on the River track—but would have fallen to the south end of that car. The train could not have been going at a very high rate of speed, because as it approached the switch the plaintiff got down to uncouple the engine, and then got back on the ladder; after the engine was uncoupled from the cars it went on up the main track, and after it crossed over the Kansas City switch the yard master threw the switch and let the cars in on the Kansas City track. Appellant also argues that, if the cars standing on the River track were dangerously near the main track, the plaintiff knew they were there, had been passing by them in switching other cars onto that track for the space of two hours, and had assisted in placing them there himself. The plaintiff testified that the accident happened in the south end of the switchyard, while all the other evidence shows that it occurred in the north end, but that is an immaterial fact, except that it is one that may be taken into consideration when the trier of fact is determining what weight should be given his testimony. There was no direct evidence on the part of the plaintiff to show where he fell to the ground; his evidence was that after he was struck he became unconscious, and knew nothing more. It is argued for the plaintiff that, if he had reached the top of the car and set the brake before he fell, the car would not have passed into the Kansas City track, because the point where he was found on the ground was south of the Kansas City switch. There is reason in the arguments of both sides on that point, but neither is conclusive; other facts are to be taken into consideration. There was evidence on the part of defendant tending to show that the plaintiff knew these cars were on the River track, and had passed them several times that night. That was probably the truth, but his knowledge that the cars were there was not knowledge that they were so close to the main track as to endanger a brakeman on a ladder passing. His position on other cars he had been riding to brake was on top, and in that position he might have passed those standing cars in safety; in fact he would have passed in safety on the car from which he fell if he had been on

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top. The only time he attempted to pass on a ladder was when he met this accident. Although he saw the cars standing on the River track he was under no obligation to measure the distance. He was working under the immediate supervision of the yard master, who, for that time, was his master, and he had the right to trust that the yard master had done his duty in that respect. In the conflicting condition of the evidence the trial court could not have done otherwise than submit the issues to the jury.

b. It is complained that the main instruction given for the plaintiff was erroneous because it submitted to the jury the question of the master's negligence in suffering the cars to be and remain on the River track so near the main track as to make the place not reasonably safe for the plaintiff to work in, and in that connection it is contended that when the master furnishes a reasonable safe place for the servant to work in, he is not liable for a transitory danger arising out of a single occurrence in which he is not at fault and of which he has no notice or opportunity to correct. There is no doubt of the correctness of that proposition. But here the master, in the person of the yard master, was present, the situation was seen by him, and if it was dangerous, it was easy to correct. The language of the instruction especially criticised is: "And if the jury believe from the evidence that the defendant, through its agents and servants in said yards at Milan, negligently placed, or negligently permitted or suffered to remain for a long period of time, a certain car on a certain side track," etc. The complaint is of the words "suffered to remain for a long period of time." Those words should not have been in the instruction, because there was no evidence on which to base it. The cars had only been there a few hours, were placed there in making up a train that was to go out later that night. But those words were harmless in this instance. The length of time the cars remained there did not render them more dangerous, nor more liable to produce this particular accident. The significance of the fact that a dangerous condition is suffered to remain a long time is that it indicates that the master had notice of it, but when there is no question about the master's knowledge, the duration of the condition is immaterial.

c. It is also complained that the instruction ignores the plea of contributory negligence, which there was evidence to sustain. The instruction contains these words: "And if the jury further find from the evidence that plaintiff was exercising ordinary care and caution in riding on the said ladders of said car in the way at the time aforesaid, and was not guilty of any negligence on his part contributing directly to produce such injury," etc. There was an instruction defining negligence and ordinary care. At the request of the defendant the court gave, among others, the following two instructions: "No 7. If the jury believe from

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the evidence that plaintiff himself was careless or negligent at the time and place of the accident, and that such negligence directly contributed to the injury which he sustained, then plaintiff cannot recover damages in this cause, and the verdict should be for the defendant. No. 8. The court instructs the jury that it was the duty of Fred Redmond, at the time mentioned in the plaintiff's petition, to exercise for his own protection from injury such care and caution as is usually exercised by prudent, careful persons under like circumstances; and, if he failed to exercise such care and caution, and such failure was the cause of, or contributed to, the injury, then the jury will find for the defendant." An instruction on the point of contributory negligence would have been more pointed if it had been founded on the plaintiff's supposed knowledge of the fact that the cars were there, but no such instruction was asked, and doubtless the instructions as given afforded ground for argument covering that question. Taking the instruction for the plaintiff in connection with those for defendant, we think the defense of contributory negligence was fairly given to the jury.

In the motion for new trial the defendant makes the point that section 2876, Rev. St. 1899 (Am. St. 1906, p. 1657), which provides that no contract made by a railroad company with its employee limiting its liability for damages under the statute shall be valid, is unconstitutional, but appellant makes no point of that kind in its brief.

If any mistake has been made in the case, it is in verdict of the jury; we find no error in the rulings of the court.

The judgment is affirmed. All concur.

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(Supreme Court of Arkansas, Feb. 14, 1910.)

[126 S. W. Rep. 375.]

Master and Servant—Injury to Railroad Brakeman—Defective Appliances—Negligence.—In an action for injuries to a brakeman caused by a defective stirrup on the car he attempted to mount, evidence held to justify a finding of a negligent inspection by the car inspector.

Master and Servant—Injury to Servant—Liability of Master.*—A railroad must through its car inspector search for hidden defects in its cars as a part of its duty to exercise ordinary care to furnish its servants with reasonably safe appliances, and to keep them reasonably safe.

Master and Servant—Injury to Servant—Assumption of Risk.—Since a master must search for hidden defects in appliances furnished the servant, and since the servant need only take notice of such defects as are open to ordinary observation, the fact that the defect was discoverable by an inspector of the master did not show that it was equally open to the observation of the servant.

Master and Servant—Injury to Servant—Regulation of Employment.—A rule of a railroad which required brakemen to attend to the brakes and display signals under the direction of the conductor, and to assist the conductor in loading and unloading freight and in inspecting cars, and that trainmen must examine for themselves and know that brake shafts and steps which they are to use are in a proper condition, and, if not, to report them to the proper authorities, and not change the obligations of the railroad and a brakeman, where the undisputed evidence showed that brakemen were not required to make a thorough examination like a car inspector, but were only required to make a general inspection.

Master and Servant—Assumption of Risk.†—A servant impliedly agrees to assume the risk of dangers ordinarily incident to the service, but not the dangers arising from the negligence of the employer, unless he is aware of the negligence and appreciates the danger.

Master and Servant—Injury to Servant—Assumption of Risk—Evidence.—Evidence held not to show that a brakeman knew of a defective stirrup on a car he attempted to mount, so that he did not assume the risk of injury arising from the defect.

Trial—Instructions—Misleading Instructions.—An instruction ignoring a material issue on which the evidence is conflicting, and allowing the jury to find a verdict without considering the issue is

*See last foot-note of *St. Louis S. W. Ry. Co. v. Lewis* (Ark.), 33 R. R. R. 618, 56 Am. & Eng. R. Cas., N. S., 618.

†See first foot-note of *Silvia v. New York, etc., R. Co.* (Mass.), 34 R. R. R. 74, 57 Am. & Eng. R. Cas., N. S., 74.

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misleading, though another instruction correctly presenting that issue is found in other parts of the charge.

Trial—Instructions—Construction.—Separate and disconnected instructions, each complete in itself and irreconcilable with each other, will not be read together so as to modify each other and present a harmonious whole, but, where the law of the case cannot be stated in one instruction, instructions, though apparently conflicting, will be read together, where the language used or the relation which the instructions are made by the whole charge to bear to each other indicate that they are to be read together.

Trial—Instructions—Construction.—In an action for injuries to a brakeman caused by a defective stirrup on the car he attempted to mount, a charge defining the duty of the railroad to provide safe appliances, and authorizing a recovery if the brakeman was injured because of the failure of the railroad to exercise reasonable care in furnishing safe cars, followed by a charge defining proximate cause, followed by a charge authorizing a recovery if the brakeman was injured because of the defective stirrup, where the defect might have been known by reasonably careful inspection, followed by a charge on the burden of contributory negligence, must be construed together and read as one instruction.

Appeal and Error—Harmless Error—Argument of Counsel.—Where, in an action for injuries to a brakeman resulting in the amputation of a leg and necessitating a journey in the baggage car to a hospital in a distant city, there was no evidence that chickens, ducks, and geese were in the baggage car, the argument of counsel that the brakeman was placed in a baggage car along with chickens, ducks, and geese, though improper, was not ground for reversal.

Appeal and Error—Harmless Error—Argument of Counsel.—Where, in an action for a personal injury, the evidence showed that defendant's surgeon had asked plaintiff to sign a written statement, and defendant proved contradictory statements by plaintiff to the surgeon, the argument of plaintiff's counsel in criticising the agents of defendant in attempting to induce plaintiff to give a statement as to the manner of his injury was not ground for reversal, where the verdict was not opposed to the weight of the evidence either as to defendant's liability or the damages awarded.

Damages—Personal Injuries—Excessive Damages.—A verdict of \$25,000 for personal injuries resulting in the amputation of both legs of plaintiff, 21 years old, earning from \$75 to \$85 per month as a brakeman and in line of promotion, with a prospect of receiving higher wages, was not excessive.

Appeal from Circuit Court, White County; Hance N. Hutton, Judge.

Action by Clyde Rogers against the St. Louis, Iron Mountain & Southern Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

St. Louis, etc., Ry. Co. v. Rogers

Kinsworthy & Phaton, S. D. Campbell, P. R. Andrews, and Jas. H. Stevenson, for appellant.

Smith & Blackford and Brundidge & Neelly, for appellee.

McCULLOCH, C. J. Plaintiff, Clyde Rogers, recovered judgment against the railway company for damages in the sum of \$25,000 as compensation for personal injuries received while working for the company as brakeman on a freight train. In attempting to mount a moving box car, the stirrup or step into which he placed his foot on the side of the car turned, his foot-hold gave way, and he fell under the wheels, and both legs were so badly crushed that they had to be amputated. This occurred at Tuckerman, Ark., about nightfall, or between sundown and dark. Some of the witnesses say it was still light enough to see, but that lanterns were lighted. The train was north-bound, and had taken a siding to allow a south-bound train to pass. After the south-bound train had passed on the main line, the head brakeman opened the switch and the engineer started the train forward, when a drawhead on the rear end of a car pulled out and broke apart. This was car marked "W. of A. 1551." Part of the drawbar and coupling fell down on the track between the rails, and, when this was discovered, plaintiff and the conductor went to the place and endeavored to throw the pieces off the track so as to free the track of the obstruction, but they found them too heavy to handle. While they were working at this, it was decided to set the broken car out of the train and leave it on the side track, and the engine with 14 cars attached—car marked "W. of A. 1551" being the rear one—pulled forward out of the siding and backed down the other track with this car in front; the broken end being forward. As the backing cars came down the other track and approached within a few feet of where plaintiff and the conductor were working to remove the broken pieces, the conductor directed plaintiff to get on this car, and help set it out. Plaintiff attempted to obey, and as he mounted the car the stirrup turned when he placed his foot in it, his handhold also loosened, and he fell under the wheels.

The stirrups are of iron and are made to hang down the side of the car, near the end, and are bolted to the sills. On examination of this stirrup a day or two later it was found that the bolt in one end was missing, so that the stirrup was held only by the bolt in the other end, which had also slipped down about an inch. The sills to which it was bolted were old and rotten, and made of wind-shaken timber, and there was a split where the bolt went through which appeared to be old. Some of the witnesses said that the stirrup swung down under the side of the car without anything apparently wrong with it to ordinary observation, but that, when touched, it would swing around on the one bolt under the side of the car. Others said it was slightly

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bent, and that one end hung around under the car. There was no evidence given by any witness to the effect that the stirrup was observed before the accident to be out of repair, or that to ordinary observation it appeared to be out of repair. Plaintiff testified that he had not noticed anything wrong with it. He stated that, when he attempted to mount the car, it appeared to be all right, the stirrup was in its usual place, and that he looked at it when he ran to get on the car. He said that the first he knew of anything being wrong with the stirrup was when it gave way beneath his foot. A car inspector for the company testified that he inspected this car, as well as all the others in the train, at Baring Cross, and that the car was in good condition and free from defects.

Defendant put in evidence, from the standard book of rules, two covering the duties of brakemen, as follows:

"Rule 400. While on the train, brakemen are under the directions of the conductor. It is their duty to attend to the brakes, be provided with, take care of and properly display train signals and danger signals, assist the conductor in loading and unloading freight, in inspecting cars and in all things necessary to the lighting, heating and ventilation of the cars; open and close the car doors and assist the conductor in the proper disposition of passengers and in preventing them from riding on the platform or in any wise violating the regulations provided for their safety in preserving order and in all things requisite for the comfort of the passengers.

"Rule. 401. Trainmen must examine and know for themselves that the brake shafts and attachments, ladders, running boards, steps, handholds and other parts and mechanical appliances, which they are to use, are in proper condition; if not, report them to the proper authorities, that they may be put in order before using."

The conductor, Mr. Parker, who was introduced by defendant as a witness, testified that the common interpretation of these rules is that brakemen are required to look around the train to see if anything is the matter, but that a brakeman would not be required to make a thorough examination like a car inspector. Quoting further his testimony, he stated: "It is a general inspection of conductors and also of brakemen looking over the train for such defects as they may find. A man would not have to grab a hold of every piece. It is the duty of the inspector to do that, as I understand. They have a car inspector at Argenta, and that is the last place the car inspector could have looked at it. It is the business of the car inspectors, as I understand it, to make an examination for hidden defects." This testimony was not contradicted.

It is, in the first place, insisted that there is not sufficient evidence to show that there was a defect in the car when it started

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on the trip, nor to sustain a charge against defendant for failing to discover the defect if any existed; in other words, that there was no defect which defendant by the exercise of ordinary care could have discovered at the time of the inspection, when the train started on the trip. We think there was sufficient evidence, however, to sustain that charge. Some of the witnesses who examined the car shortly after the accident testified that the stirrup was loose, that the sills to which it was bolted were old and made out of wind-shaken timber, and that there was an old crack where the bolts went through. The evidence also warranted a conclusion that these defects in the stirrup and the sill to which it was bolted were not attributable to the pulling out of the drawbar when the train broke in two. Now, if this condition existed as testified by the witnesses, it justified a finding that the defects could, by the exercise of ordinary care on the part of the car inspector, have been discovered when the inspection was made at Baring Cross, and that he was guilty of negligence in failing to discover them. *St. L. & S. F. R. R. Co. v. Wells*, 82 Ark. 372, 101 S. W. 738; *K. C. S. Ry. Co. v. Henrie*, 87 Ark. 443, 112 S. W. 967; *St. L., I. M. & S. Ry. Co. v. Holmes*, 88 Ark. 181, 114 S. W. 221. It was the duty of defendant, through its car inspector, to search for hidden defects. This is a part of the master's duty to exercise ordinary care and diligence to furnish its servants with reasonably safe appliances with which to work, and to keep them in reasonable state of repair. *Railway Co. v. Rice*, 51 Ark. 467, 11 S. W. 699; *St. L., I. M. & S. Ry. Co. v. Holmes*, *supra*.

Counsel argue that, if there was a defect which the inspector could have discovered, it was equally open to the observation of the brakeman, and that he should not have been permitted to recover because he, too, failed to discover it. This does not follow; for the duties of the master and of the servant are not the same. It was the duty of the master, through its inspector, to search for hidden defects, while the servant is required only to take notice of such defects as are open to ordinary observation. *Railway Co. v. Leverett*, 48 Ark. 333, 3 S. W. 50, 3 Am. St. Rep. 230. Nothing in the rules of the company as interpreted in the light of the evidence introduced in this case imposed any greater obligation on the part of the servant or any less on the part of the master. The evidence justified the belief that the master failed to discharge its duty. It does not show that the servant failed to exercise ordinary care for his own safety.

But it is claimed that plaintiff assumed the risk of danger of the defective stirrup, and that, on this account, he should not be permitted to recover. The second instruction given at appellee's request omitted any mention of the question of assumed risk, and authorized the jury to find for plaintiff upon the facts

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stated therein without considering that question. It was specifically objected to on that ground, and the ruling of the court is assigned as error. Was there any evidence that the plaintiff assumed the risk except under the general contract of employment?

The question of contributory negligence was, as will presently be shown, submitted to the jury, on correct instructions. The controlling principles of this branch of the case were stated in a recent case as follows: "An employee, by his contract of service, impliedly agrees to assume and bear the risk of all dangers from the ordinary incidents of the service, but these do not include the dangers arising from negligent acts of his employer, unless, after he becomes aware of such negligence and appreciates the danger arising therefrom, he exposes himself to it by continuing in the service. * * * But it is not correct to say that an employee assumes the risk of danger arising from negligent acts of his employer merely because he could, by the exercise of ordinary care, have discovered the defect brought about by such negligence. This might constitute contributory negligence of an employee in failing to discover a defect, but it would not be an assumption of risk, for the doctrine of assumed risk is based upon and grows out of contract; and, before it can be said that the employee has assumed the risk of danger caused by his employer's negligence, it must appear that he was aware of the negligence and appreciated the danger. *St. L., I. M. & S. Ry. Co. v. Birch*, 89 Ark. 424, 117 S. W. 243; *C. O. & G. R. R. Co. v. Jones*, 77 Ark. 367, 92 S. W. 244, 4 L. R. A. (N. S.) 837. We are not now speaking of the ordinary conditions of the service as existing when the employee took service, for of these he must take notice." *St. L., I. M. & S. Ry. Co. v. Corman*, 122 S. W. 116. Judge Riddick announced the same principle in the *Jones Case*, *supra*: "The servant is not presumed to know of risks and dangers caused by the negligence of the master, after he enters the service, which changes the conditions of the service. If he is injured by such negligence, he cannot be said to have assumed the risk, in the absence of knowledge on his part that there was such a danger; for, as we have before stated, the doctrine of assumed risk rests on contract, but, if the injury was caused in any part by his own negligence, he may be guilty of contributory negligence. On the other hand, if he realizes the danger, and still elects to go ahead and expose himself to it, then, although he acts with the greatest care, he may, if injured, be held to have assumed the risk."

Was there any evidence adduced in the case that plaintiff knew of the defective condition of the stirrup? None whatever. He says that he did not notice the defect, and there is no proof of any defect which, before the accident, was open to ordinary observation. He could have stooped down and examined the

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fastenings of the stirrup closely as the car inspector should have done; but he was not required to do that, and did not assume the risk of the danger by failing to do it. Some of the witnesses who examined the stirrup after the occurrence say it was slightly bent, and one that it turned in under the car; but there is no evidence that this condition existed before the accident. It is probable that, when plaintiff put his foot in the stirrup and threw his weight on it, it gave way because of the defective fastenings and turned around out of place, in the condition in which the witnesses found it the next day. Because it was subsequently found in this condition does not warrant the inference, in the absence of other proof and under the circumstances in this case, that it was in that condition when plaintiff placed his foot in it. We do not overlook the fact that one of defendant's witnesses who never saw the car, but who testified as an expert, said that a stirrup of this kind is on the car in plain view, and that there is nothing to prevent a brakeman from seeing it if it is loose. This witness, however, did not state that because one of the bolts was out of the stirrup, or because the sills were rotten or split so that the bolts were likely to drop out at any time, it was such a defect as was open to ordinary observation. We are therefore of the opinion that the court did not err in failing to properly submit the question of assumed risk. Instruction No. 2, at which appellant complains, permitted plaintiff to recover only on condition that defendant was guilty of negligence; and, if the jury found defendant guilty of negligence, there is no evidence of any assumption of risk.

We come next to the question of contributory negligence. The court gave the following instructions at plaintiff's request:

"(2) The jury are instructed that it was the duty of the defendant railroad company to exercise ordinary care and prudence to provide the plaintiff, Rogers, with cars having reasonably safe appliances for his use in the discharge of his duty as a brakeman, and, if you believe from the evidence that the plaintiff was injured by reason of the failure of said defendant railroad company to exercise such care and prudence in furnishing cars having reasonably safe appliances for going upon them, when it became necessary in the discharge of his duty, and that he was injured as the direct and proximate result thereof, and that the plaintiff at the time was engaged in the performance of his duties as an employee of said defendant company, and that said plaintiff was not guilty of such negligence as contributed to his injury, then it will be your duty to return a verdict in favor of the plaintiff.

"(3) The jury are instructed that by the term 'proximate cause' is meant the efficient cause, without which the injury would not have happened.

"(4) The jury are instructed that if you believe from the

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greater weight of testimony in this case that the plaintiff, while working as a brakeman for the defendant company, was injured by either falling or slipping from one of the defendant's cars or a car hauled by the defendant, and that such fall or slipping was caused by an iron step being loosened at one end, and that such iron step was not properly fastened at both ends, and that the condition of said step was known to said defendant railroad company, or might have been known by a reasonably careful inspection of the same, before the injury, then you may find for the plaintiff.

"(5) If the defendant company relies upon the plaintiff's contributory negligence as a defense, then the burden rests on the defendant to establish such contributory negligence, unless it appears from the testimony introduced in behalf of the plaintiff."

The court gave numerous instructions on the subject of assumption of risk and contributory negligence, in other parts of the charge, at the request of both plaintiff and defendant. Defendant objected to instruction No. 2 specifically on the ground that it ignored the question of assumed risk, and specific objections were made to instruction No. 4 on the ground that it ignored both the questions of assumed risk and contributory negligence; and instruction No. 5 was specifically objected to on the ground that it erroneously stated the rule of evidence applicable to the case. It has been decided by this court in an unbroken line of cases that an instruction which ignores a material issue in the case about which the evidence is conflicting, and allows the jury to find a verdict without considering that issue, is misleading and prejudicial, even though another instruction which correctly presents that issue is found in other parts of the charge. Where the instructions are thus conflicting, it is impossible for an appellate court to tell which of them the jury followed, and such an error calls for a reversal. Separate and disconnected instructions, each complete in itself and irreconcilable with each other, cannot be read together so as to modify each other and present a harmonious whole. *Selden v. State*, 55 Ark. 393, 18 S. W. 459; *Goodell v. Bluff City Lbr. Co.*, 57 Ark. 203, 21 S. W. 104; *Rector v. Robins*, 74 Ark. 437, 86 S. W. 667; *Fletcher v. Eagle*, 74 Ark. 585, 86 S. W. 810, 109 Am. St. Rep. 100; *St. L. & N. A. R. R. Co. v. Midkiff*, 75 Ark. 263, 87 S. W. 446; *Grayson-McLeod Lumber Co. v. Carter*, 76 Ark. 69, 88 S. W. 597; *St. L., I. M. & S. Ry. Co. v. Hitt*, 76 Ark. 224, 88 S. W. 911; *Bayles v. Daugherty*, 77 Ark. 201, 91 S. W. 304; *White River L. & W. Ry. Co. v. Star, R. & L. Co.*, 77 Ark. 128, 91 S. W. 14; *Merchants' Fire Ins. Co. v. McAdams*, 88 Ark. 550, 115 S. W. 175; *Jones v. State*, 89 Ark. 213, 116 S. W. 230; *So. Anthracite Coal Co. v. Bowen*, 124 S. W. 1048. There are, however, cases, as we conceive not inconsistent with

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that rule, where we have held that the law of the case cannot be stated in one paragraph or instruction, and, though the instructions given may be apparently conflicting, if from the language used or the relation which the instructions are made by the whole charge to bear toward each other it is readily seen that they are to be read together without conflict and as a harmonious whole, and they can be so read, then it is our duty to so treat them. *Arkadelphia Lumber Co. v. Posey*, 74 Ark. 377, 85 S. W. 1127; *Southern Cotton Oil Co. v. Spotts*, 77 Ark. 458, 92 S. W. 249; *Railway Co. v. Graham*, 83 Ark. 61, 102 S. W. 700, 119 Am. St. Rep. 112; *Pettus v. Kerr*, 87 Ark. 396, 112 S. W. 886; *Burke v. Sharp*, 88 Ark. 433, 115 S. W. 145. It is seen that in instruction No. 2, quoted above, the court included the question of contributory negligence, and made the plaintiff's right to recover depend upon his own freedom from negligence which contributed to his injury. The court also followed instruction No. 4 with one, No. 5, on the subject of contributory negligence, as well as gave several others on the same subject at the request of both parties. Instructions Nos. 4 and 5, on account of their juxtaposition, must be read together, practically as paragraphs of the same instruction. They are separated only by the figure indicating the number of the latter. In fact, instructions Nos. 2, 3, 4, and 5 all relate to the same subject, and should be read together. If asked to do so, the court would doubtless have stricken out the figure separating 4 and 5 so as to let them appear to be one instruction. Instead of asking this, defendant contented itself with an unfounded objection to No. 5. The objection to these instructions is not we think well taken. *Arkansas Midland Ry. Co. v. Rambo*, 90 Ark. 108, 117 S. W. 784.

Numerous objections were made to the closing argument of plaintiff's counsel, and exceptions were duly saved. One objection was to a reference to the absence of a car inspector named McAlister, who is said to have inspected the car at Argenta or Baring Cross. When the case was called for trial, defendant moved for a continuance to procure the attendance of a witness named Estes, who was a car inspector. His testimony was set out in the motion, and showed that, if present, he would testify that he inspected car "W. of A. 1551" and the other cars in the train at Baring Cross when they started on this trip, about 12 hours before the accident, and that the car was in good condition and free from defects. The court overruled the motion for continuance, but permitted defendant to read to the jury the statement in the motion as the deposition of Estes. In addition to this, the court permitted defendant to prove by another car inspector, Reynolds, the record of inspection showing that this car had been inspected when the train started on the trip and found to be in good condition. Reynolds testified, also, that he

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thought the car had been inspected by McAlister, and that the latter was assisted by Estes. He stated that he thought McAlister was then at Pinnacle, Ark. In the closing argument, plaintiff's counsel said: "If you believe Reynolds, the railroad company had it within their power to have shown this car was duly inspected at Baring Cross, and they have not done so; Reynolds stating that the man lived within 20 miles of Little Rock." We fail to discover any prejudicial effect of the statement. Reynolds was not certain that McAlister had made the inspection, but said that Estes assisted. The testimony of Estes was to the effect that he inspected the car and found it to be in good condition; but whether or not the inspection was accurate or sufficient was a question for the jury to pass on in the light of the other evidence in the case.

Another objection was to that part of the argument in which counsel said that: "The first limb had been amputated, and the boy is placed in the baggage car along with the chickens, the ducks, and the geese, and they start on that long, sad and painful ride to St. Louis." When the plaintiff was injured at Tuckerman, he was carried to Newport, where he remained overnight, and one of his legs was amputated by the company's surgeon, and then he was carried to the defendant's hospital at St. Louis. On the journey to St. Louis he rode in the baggage car on a cot. The evidence shows that he suffered intensely during the journey. The other leg was amputated in St. Louis. Now we understand from the argument of counsel that he referred to the inconvenience of the journey and the suffering which it entailed, and not to any kind of mistreatment on the part of the company's servants. It was, of course, not correct to say that he rode with the chickens, the ducks, and the geese, for there was no proof of any being in the baggage car, or that their presence would have augmented the pain. We presume the jurors possessed of an ordinary degree of intelligence; and it is therefore impossible to conceive of any prejudicial effect which the statement could have had on their minds.

Still another objection relates to counsel's harsh criticism of the agents of the company in attempting to induce plaintiff to give a statement as to the manner in which he was injured. Defendant proved contradictory statements made by plaintiff to the surgeon while he was laboring under great pain and mental distress, waiting for his leg to be dressed or amputated. On cross-examination the plaintiff's attorney drew out the fact that the surgeon had asked plaintiff to sign a written statement; and this was the basis of counsel's criticism. Counsel had a right to comment on the circumstances under which the alleged contradictory statements were made, but beyond that it was improper for him to go. But we have said in many cases that the reversal of a case on account of alleged improper argument must

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rest on an undue advantage secured by an argument which has worked a prejudice on the losing party.' *Railway Co. v. Murphy*, 74 Ark. 256, 85 S. W. 428. The reversal does not necessarily follow from an improper argument when it does not appear that it had a prejudicial effect. The verdict in this case does not appear to be against the preponderance of the testimony, either as to defendant's liability or the amount of the damages. Therefore we cannot attribute the verdict to the improper argument. The same rule does not apply to improper comments like in this argument as to statements of facts not in evidence.

It is contended that the verdict is excessive. Plaintiff was 21 years of age, with a life expectancy of about 41 years, and the evidence warrants a finding that he was then earning from \$75 to \$85 per month, and was in line of promotion with a prospect of receiving much higher wages. Both of his legs were amputated on account of the injury. He was in the hospital four or five months, and endured great and prolonged pain. We will not say that under the proof the verdict of \$25,000 is excessive.

Judgment affirmed.

JACKSON v. CHICAGO, R. I. & P. RY. CO.

(Circuit Court of Appeals, Eighth Circuit, February 14, 1910. On Rehearing, May 10, 1910.)

[178 Fed. Rep. 432.]

Statutes—Implied Amendment or Repeal—General and Specific Statutes.—Where there is a statute of general application giving a right of action and a later statute applying to specific cases, as to such specific cases the later statute alone can be invoked.

Removal of Causes—Diversity of Citizenship—Separable Controversy.—A joint action in a state court against two defendants for a tort, which is governed as to the two defendants by different statutes, fixing different grounds of liability and admitting of different defenses, is separable and is removable by one defendant, where the necessary diversity of citizenship exists as to such defendant, although the other defendant may be a citizen of the same state as plaintiff.

Master and Servant—Master's Liability for Injury to Servant—Negligent Act of Fellow Servant.—Although a master is by statute made liable for an injury resulting from the negligent act of a fellow servant, it is essential to such liability that the act should have been done while in the prosecution of the master's business.

Master and Servant—Master's Liability and Injury to Servant—Assumption of Risk.—Assumption of risk and contributory negligence are distinct and separate defenses, and the former may be

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pleaded, although the defense of contributory negligence is precluded by statute.

Master and Servant—Master's Liability for Injury to Servant—Assumed Risks.*—If a servant knows the facts and the real situation, or if they are so patent as to be readily observed by him, he assumes the risk therefrom, and the master is not liable for an injury which follows.

Master and Servant—Master's Liability for Injury to Servant—Retention of Incompetent Servant.—Where a servant had been in the employ of a master for four or five years without complaint having been made by any one as to his efficiency, character, or habits, the master cannot be charged with negligence in retaining him.

Master and Servant—Master's Liability for Injury to Servant—Negligence of Fellow Servant—Assumption of Risk.—Plaintiff's intestate was employed as a section hand by defendant railroad company. It was a custom of the foreman to carry a gun with him on the hand car on which the crew went to and from their work for the purpose of hunting, solely for his own pleasure and benefit, and on one occasion when removing the car from the track the gun, which was on the car, was accidentally discharged, killing plaintiff's intestate. He knew of the custom, and that the gun was at times loaded, and had made no objection. Held, that the accident was one for which defendant was not responsible, and, further, that deceased assumed the risk which precluded a recovery for his death.

In Error to the Circuit Court of the United States for the District of Nebraska.

Action by Mary Jackson, administratrix of the estate of Harry Jackson, deceased, against the Chicago, Rock Island & Pacific Railway Company. Judgment for defendant, and plaintiff brings error. Affirmed.

The plaintiff brought this action in the state court against the defendant company and Peter Couture for the alleged wrongful act resulting in the death of plaintiff's intestate. On the ground of diversity of citizenship and an alleged separable controversy the case was removed on the petition of the railway company to the United States court. That court overruled a motion to remand. Thereupon plaintiff dismissed as to Couture by filing an amended petition against the railway company only.

Jackson, the deceased, with five others, were sectionmen under Couture, their foreman, all of whom were engaged in the maintenance of six miles of track. The foreman employed and dis-

*See second foot-note of *Silvia v. New York, etc., R. Co.* (Mass.). 34 R. R. R. 74, 57 Am. & Eng. R. Cas., N. S., 74; first foot-note of *Cleveland, etc., Ry. Co. v. Powers* (Ind.), 33 R. R. R. 563, 56 Am. & Eng. R. Cas., N. S., 563; last foot-note of *Vaillancourt v. Grand Trunk Ry. Co.* (Vt.), 33 R. R. R. 353, 56 Am. & Eng. R. Cas., N. S., 353.

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charged the men as he deemed proper, and directed them in their work. Nearly all of the section was north of the village where they resided. They would leave for their work in the morning, carrying their dinners with them, and return in the evening. In going over their section, and to and from their work, they rode on a hand car of the company; the sectionmen propelling it.

Jackson had worked for the company under Couture for about five months. Upon several occasions Couture took his shotgun with him to shoot ducks and other game, solely for his own pleasure and benefit; the gun being in no wise of any service in his work. The gun and magazine held six shells. On the return home after the day's work on an evening in October, 1907, Couture fired three shots at some birds. He then withdrew two shells, thinking there were none left. Arriving at the station, Couture alighted, leaving the gun on the hand car. Jackson and the other five men went a short distance down the track to where the hand car was to be put away for the night. In taking the car from the track, in some unexplained way the remaining shell in the gun was exploded, killing Jackson instantly.

Fitzgerald was the roadmaster. He employed and discharged the foremen. Fitzgerald went over his division every day or so, giving directions as to the maintenance of the roadway and track, and seeing what work was necessary and what was done. It is possible that at times he saw the gun on the hand car, but that he did see it there is no evidence, and there is no evidence that he knew or believed the gun was loaded.

At the close of the evidence, on motion of the company, the court directed a verdict for the defendant, and there was a judgment accordingly.

George W. Berge, for plaintiff in error.

Paul E. Walker (*M. A. Low, on the brief*), for defendant in error.

Before SANBORN and ADAMS, Circuit Judges, and MCPHERSON, District Judge.

SMITH MCPHERSON, District Judge (after stating the facts as above). 1. For many years there has been in Nebraska a statute allowing a recovery for the death of a person caused by the wrongful act of another. The action must be brought in the name of the personal representative of the deceased, and the amount recovered shall be for the exclusive benefit of the widow and next of kin, and shall be distributed as though personal property left by deceased dying intestate. That statute applies generally to persons and corporations doing the wrongful act. The statute of limitations under that statute is two years. In 1907 the Legislature enacted that railway companies should be liable to any employee for an injury, or in case of his death to

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his representative, resulting from the negligence of any co-employee, officer, or agent, or by reason of any defect or insufficiency due to its negligence in its cars, appliances or machinery. Under this statute contributory negligence is no defense when slight and that of the company is gross, but the damages shall be diminished in proportion to the negligence attributable to each, and all questions of negligence shall be for the jury. No contract of insurance or relief benefit shall be a defense, except such contribution for relief benefit paid by the company may be deducted from the damages. The recovery shall be distributed as follows: (1) To the widow and children; (2) if no widow or children, to his parents; (3) if no parent, then to the next of kin dependent upon him.

The statute of limitations under this statute is four years. Under this statute Couture could not be liable, because it makes a railway company alone liable. If liable, it is by reason of the older statute.

Plaintiff's counsel invokes the rule agreed to by all that as to removals defenses cannot be considered, but whether the action is separable must alone be determined from the petition stating the cause of action. But we hold that the cause of action as stated by plaintiff is separable for the reason that the statute fixing the liability of a railway company is the latter statute, and specifically and with detail determines the liability, to whom the recovery shall go, and what shall constitute a cause of action, and barring certain defenses which could be made under the former statute. And the rule is that when we have one statute of a general application, and another applying to specific cases, that as to such specific cases the latter statute only can be invoked. *Griffith v. Carter*, 8 Kan. 565; *Long v. Culp*, 14 Kan. 412; *In re Rouse* (D. C.) 91 Fed. 96, 100; *State ex rel., etc., v. Hobe*, 106 Wis. 411, 82 N. W. 336; *Kepner v. U. S.*, 195 U. S. 100, 125, 24 Sup. Ct. 797, 49 L. Ed. 114; *De Bolt v. Railroad*, 123 Mo. 496, 72 S. W. 575; *Townsend v. Little*, 109 U. S. 504, 512, 3 Sup. Ct. 357, 27 L. Ed. 1012.

The holding is that the case on the petition of the railway company, a corporation, of Iowa and Illinois, was removable as against the plaintiff, a citizen of Nebraska, even though Couture was likewise a citizen of Nebraska.

But even though the motion to remand was erroneously overruled, the error was cured when plaintiff filed an amended petition making the railway company alone a defendant. The error was waived and jurisdiction was conferred. *Guarantee Co. v. Mechanics' Co.*, 26 C. C. A. 146, 80 Fed. 766, 771; *In re Moore*, 209 U. S. 490, 496, 28 Sup. Ct. 589, 52 L. Ed. 904; *Powers v. Railroad*, 169 U. S. 92, 18 Sup. Ct. 264, 42 L. Ed. 673.

2. Jackson had ridden back and forth on this hand car for five months. It was a safe place to work considering the duties

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of the employees, and the nature of the work, and the elaborate argument, with the authorities cited, that the company owed him the duty of furnishing a safe place to work, is not pertinent to the facts of the case. It was a safe place, and from which no harm came to Jackson, except by reason of the gun, which presents another question. And as to carrying the gun, he made no objection, knew that it had been used on several trips, knew that at times it was loaded, and knew that it had been fired three times en route home on the evening in question. He made no protests, was not promised that the gun would not again be carried, and in every particular assumed the risks of the car, and all that was carried thereon. The many cases cited by plaintiff's counsel, generally speaking, are those wherein the injured employee did not know of the object causing the injury, and the company did know of the same, or by the exercise of diligence could have known, such as low overhead bridges, nearness of water cranes or poles to the track, ditches or obstructions in the yards, and many other cases of like kind and principle. But such is not the question here.

The question is, assuming that Couture was negligent in taking with him on several occasions his own gun, in no wise connected with his employment, taking it for his own pleasure, and on the one occasion in question leaving it on the hand car with one load therein, Was such negligence chargeable to the company? The test of the employer's liability is not in the fact that the negligent act of the servant was during the existence of his employment; nor is the test that his act was done during the time he was doing some act for his employer. But the test is: Was the act causing the injury done in the prosecution of the master's business? *Clancy v. Barker*, 66 C. C. A. 469, 131 Fed. 161; *Bowen v. Railroad*, 69 C. C. A. 444, 136 Fed. 306, 70 L. R. A. 915; *Railroad v. Harvey*, 75 C. C. A. 536, 144 Fed. 806; *Marrier v. Railroad*, 31 Minn. 351, 17 N. W. 952, 47 Am. Rep. 793; *Hudson v. Railroad*, 16 Kan. 470.

3. That Jackson assumed the risks, and that such assumption is not modified nor controlled by the fact that contributory negligence is no defense, is clearly the settled rule. *Burke v. Union Co.*, 84 C. C. A. 626, 157 Fed. 178; *Omaha Co. v. Sanduski*, 84 C. C. A. 89, 155 Fed. 897, 19 L. R. A. (N. S.) 355; *Railroad v. Griffin*, 85 C. C. A. 240, 157 Fed. 912; *Kirkpatrick v. Railroad*, 87 C. C. A. 35, 159 Fed. 855; *St. Louis Cordage Co. v. Miller*, 61 C. C. A. 477, 126 Fed. 495, 63 L. R. A. 551; *Lake v. Shenango*, 88 C. C. A. 69, 160 Fed. 887.

4. Without reference to whether Couture was a vice principal or a fellow servant of Jackson, and without reference to whether Fitzgerald or any other officer of the company had knowledge of how many times the gun had been carried on the

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hand car, it conclusively appears that Jackson had full knowledge thereof.

Conceding, as we do, that the rule is that it is the duty of the master to exercise reasonable care to provide a reasonably safe working place for the servant, who in turn is entitled to act upon the assumption that that duty has been performed, however, if the servant knows that facts and the real situation, or if the facts and the true situation are so patent as to be readily observed by him, is not liable by reason of an injury which follows. *United States Smelting Co. v. Parry*, 92 C. C. A. 159, 166 Fed. 407; *Choctaw R. R. v. McDade*, 191 U. S. 64, 67, 24 Sup. Ct. 24, 48 L. Ed. 96.

5. Couture had been foreman for four or five years. His services, and the manner of performing the same, were apparently satisfactory to the company. No complaint was at any time made by any person as to his competency, efficiency, character, reputation, or habits. That such a servant, or official, if he can be called such, could be retained in the service without subjecting the company to the charge of negligence, need not be discussed. See the opinions of this court in the case of *Weeks v. Scharer*, 111 Fed. 330, 49 C. C. A. 372, and in the same case when again before this court as reported in 129 Fed. 333, 64 C. C. A. 11.

Under no construction that can be given to the testimony is the defendant company liable, and the action of the court directing a verdict was right.

The judgment of the Circuit Court is affirmed.

On Rehearing.

A petition for rehearing by the plaintiff in error has been presented and considered. It is based upon two grounds only:

1. It is insisted that this case was not rightly removed from the state to the United States court. The railroad company would have been liable under a former statute on the facts pleaded. So would the section foreman, Peter Couture. But by a later statute specifically making a railroad company liable, and by eliminating certain defenses and changing the statute of limitations, the railroad company would alone be liable thereunder. This is the later statute upon the subject, giving a cause of action to an employee or his legal representative as against the railroad company. Under that statute Couture could not be sued. And he only could be sued under the older statute.

For the reasons given in the former opinion we hold that the cause of action was a separable one, and that the case was properly removed to the United States court.

2. After the case was removed to the United States court, and the motion to remand was overruled, the case was dis-

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missed as to defendant Couture. In the former opinion it is said that, even though the motion to remand was erroneously overruled, the error was cured by filing an amended petition against the railway company alone. We are in doubt as to that proposition, and withdraw the same from the original opinion.

But such withdrawal does not change the conclusions reached, and the petition for rehearing is therefore denied.

RICH v. ASHEVILLE ELECTRIC CO.

(Supreme Court of North Carolina, May 27, 1910.)

[68 S. E. Rep. 232.]

Appeal and Error—Review—Nonsuit.—On review of a nonsuit, the evidence must be construed most favorably for plaintiff.

Master and Servant—Street Car Employees—Injury—Liability of Employer.—A street car conductor cannot recover for injury caused by falling from the running board of his car, resulting from his right hand slipping from a defective side curtain and striking his left hand by which he was maintaining himself, since the accident was not a natural result of the defect.

Negligence—Violation of Statute.—Violating a statute is negligence, but, to entitle another to recover for an injury on account thereof, he must show that the violation proximately caused the injury.

Master and Servant—Street Railways—Negligence—Proximate Cause.—That a street railway violated Revisal 1905, §§ 2615s, 3800, requiring vestibule fronts on street cars, does not render it liable for injury to a conductor who fell from the running board of a car through his right hand slipping from a side curtain and striking his left hand with which he maintained himself, since there was no causal connection between the violation and the accident; the purpose of sections 2615s, 3800, being to protect the motorman from unnecessary exposure to the weather.

Clark, C. J., dissenting.

Appeal from Superior Court, Buncombe County; J. S. Adams, Judge.

Action by J. O. Rich against the Asheville Electric Company. From a judgment of nonsuit, plaintiff appeals. Affirmed.

The plaintiff sued to recover damages for injuries received by him on Sunday morning, December 3, 1905, between 10 and 11 o'clock a. m., while acting as conductor on one of the defendant's cars in Asheville. The plaintiff testified that he had been, prior to the injury, a conductor for three years; that he asked to be relieved of his regular run that morning, and to fill an ex-

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tra man's run, which was to take cars empty to Riverside Park—a distance of about three miles—to bring the cadets of Bingham School in to church; that when he reported to the car barn he found "signed up" on the bulletin board two open summers cars for this special run; that the weather was cold, something near freezing, a strong wind blowing from the north, cloudy and "spitting snow;" the thermometer had dropped from 49° Far. at midnight to 33° Far. between 10 and 11 a. m.; that the summer cars are not equipped with a vestibule, but they have a glass front in the rear of the front platform, and in front of the rear platform; that the seats run across the car and at each end there is a roller curtain which can be pulled down or rolled up as the weather conditions require; that these curtains work in grooves cut in posts at the ends of each seat; that fastened on the outside of each post is a substantial stanchion for holding to as one walks or stands on the running board or step, which board or step runs lengthwise the car on either side, and is used by passengers alighting from or getting on the car, and likewise used by the conductor in going from one end of the car to the other, in collecting fares of passengers; that after reporting at the car barn on the morning of December 3d to Mr. White, the man in charge, he observed that the open cars were "signed up" for the run he was to make; that he complained and requested closed cars on account of the weather; that White told him he would see about it; that he, the plaintiff, looked around and saw three closed cars apparently in good order, and went to report to White, but he had gone, and the other car crews had left, so he took out the open car at 10:5 a. m. and proceeded on his run to Riverside Park; that he had no passengers and took on none; that he had his overcoat, but did not put it on, and stood on the rear platform; that his car made the trip to the park in about 20 minutes; the cadets got aboard, pulled down the curtains certainly on one side of the car, and the plaintiff started his car back to Asheville; that the car had gone about 200 or 300 yards when he started to collect fares; that he had to roll up the curtain, which was done by a pull, when it rolled up by a spring; that the curtain caught and he jerked it with his right hand, his hand slipped off and either struck his left hand with which he was holding to a stanchion, or it being numbed with cold, slipped loose, and he fell from the running board, and received the injuries for which he sues to recover damages. At the conclusion of the evidence, his honor allowed the motion, made under the statute, for judgment as of nonsuit, and the plaintiff excepted and appealed to this court.

Frank Carter and H. C. Chedester, for appellant.

Martin & Wright, for appellee.

MANNING, J. Construing the evidence in the view most favorable for the plaintiff, as we must do under the uniform rulings

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of this court, where the motion for judgment as of nonsuit is allowed, we are not convinced that his honor committed error in allowing the motion. In speaking of an injury occurring to the plaintiff, in *House v. Railroad* (at this term) 67 S. E. 981, where the plaintiff, a servant of the defendant, employed to clean its cars and wash its windows, was injured by attempting, with unusual force, to raise a window which had become tight in the sash, when her hand slipped, broke through the glass and was severely cut, Mr. Justice Hoke said: "We have repeatedly decided that an employer of labor is required to provide for his employees a reasonably safe place to work, and to supply them with implements and appliances reasonably safe and suitable for the work in which they were engaged. As stated in *Hicks v. Manufacturing Co.*, 138 N. C. 319—325, 50 S. E. 703, 705, and other cases of like import, the principle more usually obtains in the case of 'machinery more or less complicated, and more especially when driven by mechanical power,' and does not, as a rule, apply to the use of ordinary everyday tools, nor to ordinary everyday conditions, requiring no special care, preparation, or provision, where the defects are readily observable, and where there was no good reason to suppose that the injury complained of would result. The reason for the distinction will ordinarily be found to rest on the fact that the element of proximate cause is lacking—defined in some of the decisions as 'the doing or omitting to do an act which a person of ordinary prudence could foresee would naturally or probably produce the injury.' *Brewster v. Elizabeth City*, 137 N. C. 392, 49 S. E. 885. These windows not infrequently become tightened from different causes, and, while it may be a great inconvenience and should perhaps be given more attention than it receives, no one would say that an injury of this character would ordinarily arise or be likely to ensue, and therefore no actionable wrong has been established." This case, we think, is decisive of the point presented in the present case, as to the tightening of the curtain which plaintiff was attempting to roll up. No one would say that the injury which plaintiff received—falling from the running board or step—would ordinarily arise or be likely to ensue from this cause. No reason is given, nor does any appear, why the plaintiff, as he had charge of the car, did not examine these curtains before leaving the barn, if he had apprehended any injury as likely to ensue to him from their becoming tightened in the grooves, as such a condition was readily observable. The liability of the defendant, however, was urged before us chiefly upon the ground that it was operating a car for passengers on its line in violation of sections 2615s, 3800, Revisal, which provides that "all street passenger railway companies shall use vestibule fronts * * * on all passenger cars run by them on their lines during the latter half of the month of November, and

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during the months of December, January, February and March of each year. * * * Provided, further, such companies may use cars without vestibule fronts in cases of temporary emergency in suitable weather," etc. While the evidence does not disclose any causal connection between the failure to use the vestibule front on the car the plaintiff was using and the injury received by him, or that defendant's failure to provide a vestibule front was an act which a person of ordinary prudence could foresee would naturally or probably produce the injury complained of, yet it is insisted by the plaintiff that the running of a passenger car without the vestibule front was forbidden by statute, and constituted negligence, for which the defendant is liable to plaintiff. In *Henderson v. Traction Co.*, 132 N. C. 779, 44 S. E. 598, this court said: "After a careful examination of a number of authorities, we are of the opinion that the sound doctrine is that a violation of the public statute or a city ordinance is evidence of negligence, to be submitted to the jury. It is generally held, and this we regard as the true doctrine, that the element of proximate cause must be established, and it will not necessarily be presumed from the fact that a city ordinance or statute has been violated. Negligence, no matter in what it may consist, cannot result in a right of action unless it is the proximate cause of the injury complained of by the plaintiff. Elliott on Railroads, § 711." This case has been approved in *Cheek v. Lumber Co.*, 134 N. C. 225, 46 S. E. 488, 47 S. E. 400.

In *Leathers v. Tobacco Co.*, 144 N. C. 330, 57 S. E. 11, 9 L. R. A. (N. S.) 349, Mr. Justice Connor, speaking again for this court, reviewed in an elaborate opinion the whole doctrine, and quoted with approval, as expressing the conclusion reached by the best considered authorities, the following language from Thompson on Neg. vol. 1, § 10: "When the Legislature of a state or the council of a municipal corporation, having in view the promotion of the safety of the public or of individual members of the public, commands or forbids the doing of a particular act, the general conception of the courts, and the only one that is reconcilable with reason, is that a failure to do the act commanded, or doing the act prohibited, is negligence as mere matter of law, otherwise called negligence per se; and this, irrespective of all questions of the exercise of prudence, diligence, care or skill, so that if it is the proximate cause of hurt or damage to another, and if that other is without contributory fault, the case is decided in his favor, and all that remains is to assess his damages." The conclusion of this court is thus stated in that opinion: "Upon careful consideration, we conclude that the law is correctly laid down by Judge Thompson and the other authors quoted, and sustained by the best-considered decided cases. * * * While it is true that if there be any dispute regarding the manner in which the injury was sustained, or if, upon the conceded facts, more than one inference may be fairly

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drawn, the question should be left to the jury, yet it is equally well settled that when there is no dispute as to the facts, and such facts are not capable of more than one inference, it is the duty of the judge to instruct the jury, as a matter of law, whether the injury was the proximate cause of the negligence of the defendant. *Rolin v. Tobacco Co.*, 141 N. C. 300, 53 S. E. 891, 7 L. R. A. (N. S.) 335." Again, this court was called upon to consider the question in *Starnes v. Mfg. Co.*, 147 N. C. 556, 61 S. E. 525, 17 L. R. A. (N. S.) 602, and speaking through Mr. Justice Brown, said: "As to the second contention, it is decided squarely against the defendant in the recent case of *Leathers v. Tobacco Co.*, supra, where it is held not only that a cause of action accrues to the child, if injured, but that it is negligence per se, and not merely evidence of negligence, to violate the statute. Revisal 1905, § 3362. * * *

This brings us to consider defendant's third contention, a matter not fully determined in the *Leathers Case*, and which may be thus stated: That the plaintiff cannot recover, because the employment of him, although willfully and knowingly done in violation of the statute, was not the proximate cause of this injury, inasmuch as he did not receive the injury while in the discharge of the duties to which he was assigned." After reviewing the evidence in that case tending to show that the violation of the statute was the proximate cause of the injury received, the court proceeded: "We do not mean to hold that the employer violating the act would be liable in damages for every fatality that might befall the child while in its factory. For instance, had the plaintiff died of heart disease, or from a stroke of paralysis, or been seriously injured by the willful and malicious act of a workman in knocking him against a machine, or injured from some cause wholly disconnected from the unlawful employment, the defendant could not be held liable in damages simply on account of the employment in violation of the statute. But we do hold that the employment, when willfully and knowingly done, is a violation of the statute, and that every injury that reasonably and naturally results is actionable. In this case, the connection between the employment and the injury is that of cause and effect, and brings the defendant within the operation of the statute." *Fowle v. Railroad Co.*, 147 N. C. 491, 61 S. E. 262. It seems to us that the principle is clearly settled by this court in the cases cited that while the violation of a statute is negligence, yet to entitle the plaintiff seeking to recover damages for an injury sustained, he must show a causal connection between the injury received and the disregard of the statutory prohibition or mandate—that the injury was the proximate cause, and this requirement is fundamental in the law of negligence. In the present case, there is an entire absence of evidence tending to show such causal rela-

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tion, but on the contrary the plaintiff's evidence negatives it. If we suppose the car equipped with a vestibule front, as required by statute, and the open cars are so equipped in many parts of the country, what causal connection existed between the injury and the negligence, or how could the inference that the failure to have a vestibule front be reasonably inferred as the proximate cause of plaintiff's injury? Besides, the manifest purpose of the statute, considered in the Leathers Case and the Starnes Case, being the statute forbidding the employment of children under 12 years of age in manufacturing establishments (Revisal 1905, § 3362), was not only to protect children of such tender years and immature judgment from injuries likely to ensue from their coming in contact with machinery, but their health from injury by such close confinement, as pointed out in *Rolin v. Tobacco Co.*, supra; while the manifest purpose of the statute in the present case was to protect the motorman (not the conductor) from unnecessary exposure to the weather while performing his duty. It will be observed that the statute does not require any particular kind or make of car to be used, but refers only to its equipment. The same necessity for showing the causal or proximate relation between the injury and the alleged negligence, is recognized as essential in *Troxler v. R. R.*, 122 N. C. 902, 30 S. E. 117, and the numerous cases citing and approving that decision, for as is said in that case: "Where the negligence of the defendant is a continuing negligence (as the failure to furnish safe appliances, in general use, when the use of such appliances would have prevented the possibility of the injury, there can be no contributory negligence which will discharge the master." And the second headnote in *Biles v. Railroad*, 139 N. C. 528, 52 S. E. 129, thus states the principle: "In an action against the defendant railroad, if the jury should find that the plaintiff, while in the performance of his duty, was injured, as the proximate consequence of a defective engine or defective appliance, then the defense of assumption of risk is not open to the defendant, by reason of the fellow servant act." We have found no case in which the plaintiff was not required to show that his injury was the proximate consequence of the defendant's negligence; even in those cases where the doctrine of "res ipsa loquitur" applies, this causal or proximate relation is sufficiently shown by the act itself, and is inferred from the act from which the injury results. The evidence of the plaintiff, construed in the view most favorable to him, failing to show this causal or proximate relation between the injury received and the negligence of the defendant we must hold that the judgment of nonsuit was properly rendered, and it is affirmed.

Affirmed.

BALTIMORE & O. R. Co. *v.* STRUBE.

(Court of Appeals of Maryland, June 30, 1909.)

[73 Atl. Rep. 697.]

Witnesses—Credibility—Evidence.—Where, on an issue whether defendant's special policeman had made an unjustifiable assault on plaintiff, such policeman testified concerning the character of the assault, the court properly permitted him to be asked on cross-examination how many times he had been convicted of assault in Baltimore city or county, and whether he had not been convicted of the assault in question, as bearing on his credibility.

Master and Servant—Assault by Servant—Special Officers—Scope of Authority.—Where C., who committed the assault for which plaintiff sued, testified that he was in defendant's employ at the time, that his duty was to look after defendant's property, with power to arrest trespassers, and arrested defendant for trespass on the property in the course of which he committed the assault in question, whether he acted within the scope of his employment or was then acting solely under his commission as an officer of the state was for the jury.

Arrest—What Constitutes.—An arrest is the seizing of a person and detaining him in the custody of the law; the officer being authorized to use such force as is necessary to accomplish the purpose.

Railroads—Arrest of Trespassers—Excessive Force—Special Officer—Master's Liability.*—Where C., a special officer commissioned by the Governor as authorized by Code Pub. Gen. Laws 1904, art. 23, § 403, was employed by defendant railroad company to look after its property and arrest trespassers, and at the time he arrested plaintiff for trespassing on the railroad company's property he committed the assault sued for as a part of the same transaction, defendant was not relieved from liability for such assault because of C.'s official capacity, provided he was acting within the scope of his authority at the time he arrested plaintiff.

Railroads—Arrest of Trespassers—Use of Excessive Force—Punitive Damages.†—Where plaintiff in the course of his arrest by a special

*For the authorities in this series on the question whether a master is liable for the malicious or willful torts of his servant, see foot-note of *Jones v. Seaboard A. L. Ry. Co.* (N. Car.), 32 R. R. R. 139, 55 Am. & Eng. R. Cas., N. S., 139.

For the authorities in this series on the question whether railroad companies are liable on account of the arrest and prosecutions made or instigated by their employees or agents, see last foot-note of *Louisville Ry. Co. v. Kupper* (Ky.), 32 R. R. R. 513, 55 Am. & Eng. R. Cas., N. S., 513; foot-note of *McKain v. Baltimore & O. R. Co.* (W. Va.), 32 R. R. R. 542, 55 Am. & Eng. R. Cas., N. S., 542.

†For the authorities in this series on the question when punitive or exemplary damages may, and may not, be recovered, see last foot-note of *Philadelphia, etc., R. Co. v. Green* (Md.), 34 R. R. R. 414, 57 Am. & Eng. R. Cas., N. S., 414.

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officer of defendant railroad company was severely beaten by him without justification, plaintiff was entitled to recover punitive damages.

Railroads—Arrest of Trespassers—Excessive Force—Special Officer.*—In an action for excessive force used by a special officer in the employ of defendant railroad company in arresting plaintiff for trespassing on the company's property, a request to charge that if such officer, while acting within the scope of his authority, arrested plaintiff while walking on defendant's tracks, and in doing so, and while plaintiff was under arrest, used unnecessary force and inflicted unnecessary indignities on plaintiff, he was then entitled to recover, was proper.

Master and Servant—Assault by Servant—Punitive Damages—Instructions.—In an action against a master for alleged excessive force used in arresting plaintiff, a prayer that if the jury believed from the evidence that plaintiff was injured by defendant's servant, and that the assault and battery was wanton, unprovoked, and excessive in its nature, then the jury could award punitive damages was objectionable in form.

Railroads—Arrest of Trespassers—Excessive Force—Instructions.—Where, in an action against a railroad company for excessive force used by defendant's private officer in effecting plaintiff's arrest, it appeared that the assault and the arrest constituted one and the same transactions, occurring on defendant's premises within a short space of time, requests to charge attempting to separate the assault from the arrest were properly refused.

Railroads—Arrest of Trespassers—Assault by Servant—Instructions.—In an action against a railroad company for excessive force used by its special officer in arresting plaintiff, a request to charge that if the officer was solely engaged in the performance of his duties as a police officer, and not as defendant's servant, or the assault occurred as the result of a personal argument or altercation between plaintiff and the officer, plaintiff could not recover, was properly refused as eliminating the question whether the altercation resulting in the assault arose out of the performance of the officer's duty as defendant's servant.

Railroads—Arrest of Trespassers—Excessive Force—Punitive Damages—Mitigation.—Where plaintiff sued for excessive force used by defendant railroad company's special officer in the course of his employment in arresting plaintiff for trespassing on defendant's right of way, the fact that plaintiff brought about his arrest by an altercation with the officer, and provoked the assault by resisting arrest, was effective merely in mitigation of punitive damages, and not in exoneration.

Appeal from Baltimore Court of Common Pleas; Thos. Ireland Elliott, Judge.

See (*) on preceding page.

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Action by George J. Strube against the Baltimore & Ohio Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed, and new trial granted.

Plaintiff's second prayer, which was granted, was as follows: "Plaintiff prays the court to instruct the jury that if they find from the evidence that the plaintiff was walking on the tracks of the defendant, a body corporate, on or about March 1, 1908, as testified to, and if they further find that William J. McCarron was in the employ of the said defendant as detective or special officer, that while the said McCarron was acting within the scope of his authority he arrested plaintiff, and in doing so, while plaintiff was under arrest, used an excessive and unnecessary amount of force and inflicted unnecessary indignities upon plaintiff, then the verdict of the jury must be for the plaintiff, even though the defendant's agent was justified in arresting plaintiff."

The plaintiff's third prayer, which was granted, recited: "The plaintiff prays the court to instruct the jury that if they believe from the evidence in the case that the plaintiff was injured by the agent and servant of the defendant, as alleged by the plaintiff, and that the assault and battery was wanton, unprovoked, and excessive in its nature, then they can inflict the vindictive and punitive damages upon the defendant."

Defendant's fifth prayer was: "The court instructs the jury that if they find from the evidence that McCarron, before any blow was struck, arrested plaintiff in the manner testified to, and if they further find that after the plaintiff was arrested, and while being taken to the station house, McCarron was only acting as a police officer of the state of Maryland, and not as an employee of the defendant, then their verdict must be for defendant, even though they find that McCarron did assault the plaintiff in the manner testified to."

Defendant's sixth prayer was: "The court instructs the jury that if they find that the assault occurred either while McCarron was solely engaged in the performance of his duties as a police officer, and not as an employee of defendant, if they so find, or that the assault occurred as the result of a personal argument or altercation between the plaintiff and the said McCarron, if they so find, then plaintiff is not entitled to recover, and the verdict must be for defendant."

Defendant's ninth prayer was: "The court instructs the jury that, if they find from the evidence that the arrest was actually completed before any blow was struck, then the plaintiff is not entitled to recovery, and the verdict must be for defendant, even though they find that McCarron did in the manner testified to strike the plaintiff."

Baltimore & O. R. Co. v. Strube

Argued before BOYD, C. J., and PEARCE, SCHMUCKER, BURKE, WORTHINGTON, and THOMAS, JJ.

Carville D. Benson and *Duncan K. Brent*, for appellant.
William H. Lawrence and *David Ash*, for appellee.

WORTHINGTON, J. The gravamen of the action in this case is the alleged use of excessive force and violence upon the appellee by William J. McCarron, a special officer of the appellant, in connection with the appellee's arrest for trespassing upon the appellant's property and right of way. The judgment below was for \$1,000 damages in favor of the plaintiff, and the defendant has appealed.

The substantial facts of the case as testified to by the witnesses for the plaintiff are as follows: On March 1, 1908, plaintiff, with four companions, was returning along the tracks of the Baltimore & Ohio Railroad Company from a visit to a gypsy camp in Baltimore county. When plaintiff and his companions had crossed the Viaduct bridge which separates Baltimore county from Baltimore city, Mr. McCarron walked up behind the plaintiff, grabbed him back of the neck, and said: "You are under arrest. Didn't I tell you to stay off this railroad?" To which the plaintiff replied: "Yes; I suppose you did, but that has been six months or so ago, and it kind of left my memory." Plaintiff then desired to be taken to the Southwestern Police Station in Baltimore city, but McCarron said he should go to Mt. Winans Police Station in Baltimore county. McCarron then, still holding the plaintiff by the collar with one hand, and without plaintiff making any resistance, struck plaintiff several blows about the face with the other. Then dragged him across the track, knocked him down, and beat him while he was down. That as a result of the assault plaintiff was rendered unconscious, two of his front teeth were knocked out, his lips were cut and swollen to twice their normal size, his mouth was bleeding, his right ear was swollen, his hearing impaired, and his neck also was swollen and painful. After the assault plaintiff went with McCarron to the Mt. Winans Police Station, where the charge was preferred against him of trespassing on the property of the appellant, to which charge he pleaded guilty, and was fined \$2.20, which was paid, and plaintiff thereupon released.

The plaintiff also called McCarron as a witness, who testified that in March, 1908, he was employed by the Baltimore & Ohio Railroad as special officer; that he was assigned to duty on the Baltimore Division; that his duties were to look after the company's property and also the care of records and car seals, to see that all the merchandise cars had their seals on arrival, and also that he had power to arrest people as trespassers; that on March 1, 1908, he arrested Strube, and charged him with tres-

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passing on the property of the Baltimore & Ohio Railroad. On cross-examination McCarron stated that his power to arrest came from his commission as special officer. The commission was then offered in evidence, but does not appear in the record.

The testimony of the defendant's witnesses in so far as it conflicts with that introduced on behalf of the plaintiff was substantially as follows: That after Strube and his companions had passed over the Viaduct bridge, and had gone about 15 feet within the limits of Baltimore city, McCarron came behind and, calling to Strube, asked him if he had not warned him to stay off the railroad property, and further said: "If you come back here, I am going to take you to the station house." To which Strube replied: "You can lock me up now if you are able." Whereupon McCarron took hold of Strube by the collar to arrest him. Strube made several passes at the officer in the effort to hit him, and then the officer, still holding to Strube with his right hand, struck him with his left hand. Strube "fell and kept his hands over his face like he was holding on to the crossties." That it was not true that McCarron struck the plaintiff more than once, or that the plaintiff became unconscious, or that plaintiff did nothing to resist arrest, or that McCarron cursed the plaintiff, or that he struck the plaintiff while he was down. On cross-examination by the plaintiff's attorneys McCarron testified as follows: "Q. When he said, 'You can't take me in now, if you wanted to,' that insulted you? A. Yes, sir. Q. You took him then? A. Yes, sir. Q. If he had not said that, you wouldn't have taken him in at all? A. No, sir. If he had gone on; no, sir. Q. You did it just to spite him? A. No, no. Q. Did you say anything to the other boys? A. He told me I might arrest him if I was able, and then I arrested him. Q. You arrested him to show you were able? A. It looks that way."

We have given the substance of the testimony on both sides, at some length, so that the questions of law presented by the prayers may be clearly understood.

During the progress of the trial the following questions were asked of McCarron on cross-examination, and allowed to be answered against the defendant's objection: "Q. How often have you been convicted of assault in Baltimore city or Baltimore county? A. I was arrested once when I was 16 years old at a dance in Cowen's Hall up here, and the men got fighting and I was arrested. Q. You were arrested and convicted at the Southwestern Police Station for this assault upon Strube, were you not? A. Yes, sir." Separate exceptions were taken to the rulings of the trial court as to both of these questions; but as they both involve, in part, the same principle of law, they will be considered together. The ground upon which this evidence is sought to be justified is that it "goes to the credibility

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of the witness." More properly speaking, it may be said to affect the weight of the witness' testimony in this case. Indeed, the first question seems to have been framed with a view to eliciting information concerning the witness' general disposition for fighting. But in either aspect we think the question was admissible under the circumstances. The issue was whether McCarron had made an unjustifiable assault upon the plaintiff. The plaintiff's testimony tended to prove that the assault was not justified. McCarron's tended to prove that it was. If the answer to the first question had shown that McCarron had been convicted of a number of assaults, it would have reflected upon the weight of his testimony as to the justification for the assault in this case. The answer, however, was of such a negative character as to be of little value either for or against the plaintiff, and, even if error, it would have been harmless error.

The second question objected to is admissible for the same reason as the first. The answer affects the weight of McCarron's testimony as to the character of the assault, and therefore in a sense his credibility as a witness. The case of *Mattingly v. Montgomery*, 106 Md. 461, 68 Atl. 205, is directly in point. The cases cited by appellant in support of its contention that such evidence is not admissible are not apposite. Such evidence would not be admissible in chief for the purpose of proving the fact of the assault, but the questions are proper upon cross-examination of the person charged with committing the assault.

The third exception found in the record relates to the prayers. The principal points of the defendant's contention in regard to these are (1) that in making the arrest McCarron acted as a commissioned officer of the state of Maryland, and not as an employee of the defendant; but, if this first proposition be unsound, then (2), as soon as the arrest was completed, McCarron lost his dual capacity of officer and agent, ceased to be an employee of defendant, and became only an officer of the state of Maryland, and that, therefore, defendant is not liable for the assault. As to the first proposition, the commission spoken of is not in the record, and we are uninformed as to what authority it conferred upon McCarron, but assuming that it was a commission issued by the Governor under section 403, art. 23. Code Pub. Gen. Laws 1904, we yet cannot yield our assent to such a proposition. McCarron testified that he was in the employ of the defendant at the time of the arrest, that his duties were to look after the company's property, and that he had power to arrest trespassers. We must assume that the plaintiff in walking along the right of way of the defendant company was violating the law, for, when taken before a justice of the peace, he pleaded guilty to the charge of "trespassing on the property of the Baltimore & Ohio Railroad." The court could not say as a matter of law that in making the arrest McCarron was not

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acting within the scope of his employment as special officer of the defendant, or that he was then acting solely under his commission as an officer of the state of Maryland. Such a question was one proper to be submitted to the jury under all the evidence in the case. As was said by this court in *Deck's Case*, 102 Md. 669, 677, 62 Atl. 958, 961: "The question whether the special officer or detective was acting within the scope of his employment as an employee of the company at the time of the commission of the act complained of was a question for the jury to pass upon under all the facts and circumstances of the case." Neither could the court declare under the evidence in this case that, if the assault was made after "the arrest was actually completed," then the plaintiff was not entitled to recover. An arrest is the seizing of a person and detaining him in the custody of the law. 1. Bouvier, Law Dict. 166. An officer authorized to make an arrest may use necessary force. *Id.* In this case both the arrest and the assault occurred on the railroad tracks of the defendant as part of one and the same transaction apparently within the space of a very few moments of time, and it would not do under such circumstances for the court to say or submit to the jury to say that immediately after putting his hands on Strube, and saying, "I am going to put you under arrest," that thereafter McCarron ceased to be an employee of the defendant, and became merely an officer of the state. If McCarron was acting within the scope of his employment in making the arrest, the defendant would be responsible even if McCarron acted maliciously or willfully in committing the assault, because the whole occurrence was but one transaction. If McCarron was not acting within the scope of his employment in making the arrest, then, of course, the defendant would not be liable. In this case the arrest and the assault must be treated as so merged together into one transaction as to be scarcely separable for practical purposes, even though theoretically they could possibly be regarded as distinct acts. The ground of the master's responsibility for the malicious torts of his servants or agents is this: That, where one of two innocent persons must suffer for the wrong of a third, the loss must fall upon him who has enabled the third person to do the wrong. McCarron was a special officer employed and paid by the appellant, and assigned to duty on the Baltimore Division of its right of way. His selection was the appellant's and the appellant must bear the responsibility of his acts if done within the scope of his employment. As stated by Judge Boyd in the case of *Consolidated Ry. Co. v. Pierce*, 89 Md. 503, 43 Atl. 940, if the servant was acting at the time in the course of his master's service, and for his benefit within the scope of his employment, the mere fact that he acted unlawfully, willfully, or wantonly does not

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necessarily show that he is no longer in his master's employ. We think there was evidence in the case proper to be submitted to the jury as to whether McCarron when he arrested the plaintiff was acting within the scope of his employment or not. We must hold, therefore, that defendant's first special exception was properly overruled, and the plaintiff's second prayer properly granted. The defendant's objection to this prayer, based on the instruction taken from Twilley's Case, 106 Md. 445, 67 Atl. 265, cannot be sustained, because that was a prayer offered by the defendant and presents a counter proposition to that contained in the plaintiff's second prayer. It would have been entirely proper for the court below to have granted a prayer concluding for the defendant modeled after the one referred to in Twilley's Case, supra, but no such prayer seems to have been offered, and, as we have said, we see no objection to the form of plaintiff's second prayer as granted. We think, however, that the form of the plaintiff's third prayer as to the measure of damages is objectionable.

In the case of Smith v. P. W. & B. R. R. Co., 87 Md. 52, 38 Atl. 1073, this court said, quoting from Quigley's Case, 21 How. 214, 16 L. Ed. 73, that: "Whenever the injury complained of has been inflicted maliciously or wantonly, and with circumstances of contumely or indignity, the jury are not limited to the ascertainment of simple compensation for the wrong committed against the aggrieved person. But the malice spoken of in this rule is not merely the doing of an unlawful or injurious act. The word implies that the act complained of was conceived in the spirit of mischief or of criminal indifference to civil obligations." And in B. & O. v. Barger, 80 Md. 34, 30 Atl. 562, 26 L. R. A. 220, 45 Am. St. Rep. 319, the court said: "Whilst the provocation of the plaintiff may not justify an assault, yet if it be of such character as would naturally arouse the anger and passion of men of ordinary temperament, and it is not too remote, it is admissible in mitigation of damages." There is some evidence in this case to the effect that Strube provoked McCarron to arrest him by "bouncing out of the gang," and starting an altercation with the officer, and afterwards provoked the assault by resisting arrest, and while not meaning to say that the plaintiff is not entitled to something more than compensatory damages, if the jury find for plaintiff at all, yet we think the plaintiff's third prayer was not drawn with sufficient accuracy to properly submit the questions of punitive damages to the jury.

For the reasons we have already assigned, the defendant's first, second, third, and fourth prayers, which seek to withdraw the case from the jury, were properly refused.

We think the defendant's fifth and ninth prayers, which seek to separate the assault from the arrest, faulty, under the circum-

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stances of this case, for the reason, as we have already said, that both the assault and the arrest constitute but one and the same transaction, occurring wholly on the premises and right of way of the defendant within a very short space of time, and under the circumstances it would have been improper to instruct the jury to attempt for the purpose of wholly exonerating the defendant to distinguish between them.

The defendant's sixth prayer is objectionable because it leaves out of consideration the question whether the altercation resulting in the assault did or did not arise out of the performance by McCarron of his duty as employee of the defendant. If Strube was at the time unlawfully trespassing on the premises of the defendant, and for so doing he rendered himself liable to arrest by the special officer acting within the scope of his employment, the fact that he brought about his arrest by an altercation with the officer, and then provoked the assault by resisting arrest, would not wholly exonerate the defendant from the consequences of the use of excessive force and violence by McCarron upon him, though such provocation might be considered in mitigation of punitive damages.

Defendant's seventh prayer, having been granted, is not before us for review.

Defendant's first and second special exceptions were properly overruled because there was evidence legally sufficient to warrant submitting the case to the jury.

But for error in granting plaintiff's prayer as to the measure of damages the judgment must be reversed.

Judgment reversed, with costs, and a new trial awarded.

HUNTER v. SOUTHERN RY. CO.

(Supreme Court of North Carolina, May 27, 1910.)

[68 S. E. Rep. 237.]

Master and Servant—Injury to Third Persons—Independent Contractors.*—In an action against defendant for the death of plaintiff's wife, alleged to have been caused by negligently conducting blasting operations near plaintiff's house, the fact that the work was done for defendant by an independent contractor did not alone exempt defendant from liability, but it appearing that defendant by its own

*For the authorities in this series on the subject of the liability of a railroad for the negligence of an independent contractor employed by it, see last paragraph of foot-note of *Smith v. South & W. R. Co.* (N. Car.), 34 R. R. R. 140, 57 Am. & Eng. R. Cas., N. S., 140; *Thomas v. Wisconsin Cent. Ry. Co.* (Min.), 33 R. R. R. 609, 56 Am. & Eng. R. Cas., N. S., 609.

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servants had first attempted to perform the work, and became aware that its performance in the manner attempted would injure the plaintiff, and that defendant afterwards secured the work to be done through an independent contractor, who conducted it in the same negligent manner in which it was conducted by defendant, it was liable.

Death—Damages—Husband and Wife.—Plaintiff, as administrator, was entitled to recover damages for the wrongful death of his wife, and was not prevented because as husband he was entitled to her earnings, so that she could accumulate nothing, and was valueless to her estate.

Appeal from Superior Court, Buncombe County; M. H. Justice, Judge.

Action by J. W. Hunter, administrator, against the Southern Railway Company. Judgment for plaintiff. Defendant appeals. Affirmed.

The plaintiff, as administrator of his wife, brought this action to recover damages for the death of his wife, and alleged that:

“(4) During the spring and summer of 1906 the defendant railroad company did willfully, wantonly, and in a grossly negligent manner, and in utter disregard of the rights of the plaintiff's intestate, carry on and conduct its blasting operations across the French Broad river from where the plaintiff's intestate lived, and did use excessively large charges of explosives, and did wantonly, willfully, negligently, and carelessly fail to take proper precautions to prevent throwing of rocks by the explosions of the blasts around and about the home of the plaintiff's intestate.

“(5) The plaintiff in this case, James W. Hunter, who was at the time of the acts and negligence complained of the husband of the plaintiff's intestate, notified the defendant, its agents and servants, of the dangerous and negligent manner in which they and the defendant were conducting the said blasting operations, and the said defendants, its agents and servants, were requested by the said James W. Hunter to use the proper care in such operations, that his intestate was in a delicate state of health, and that such reckless and dangerous blasting so near her home would probably inflict upon her serious injury, and might cause her death; that the defendant railway company, through its agents and servants, replied to the said James W. Hunter, on being notified, that they, the said agents and servants of the defendant, had been instructed to ‘tear hell out of the side of that mountain,’ and that they intended to do it, regardless of consequences, and thereafter the said blasting was continued in the same negligent manner as before.

“(6) On account of the negligence of the defendant, its agents and servants, as hereinbefore set forth, the health of the

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plaintiff's intestate was destroyed, and her nervous system was so shocked and wounded that she became seriously ill therefrom and died, all of which was caused by the acts and negligence of the defendant, its agents and servants, as hereinbefore set forth."

The defendant, after denying the imputed acts of negligence, for a further defense pleaded that this defendant, Southern Railway Company, on the ——— day of June, 1906, made and entered into a written contract with Timothy Shea to construct a roadbed for extension of certain tracks at Alexander, N. C., and that said contract was in all respects a lawful one, which the parties thereto might lawfully make and perform; that the work of constructing a roadbed of the character and nature the said Timothy Shea was employed by this defendant to make was an independent avocation, calling, or business in which the said Timothy Shea was, and had for many years previously been, engaged, and for the exercise of which he had and owned all of the necessary means and appliances; that this defendant, under said contract, was neither principal nor master, nor did it reserve any general or special control over said Timothy Shea either in respect of the manner of performance of said contract by him or in respect of the agents to be employed by the said Shea in doing said work, nor did this defendant, before the commencement of said contract by the said Shea heretofore mentioned, or at the commencement of the same or at any time during the progress of its performance assume or in any manner attempt to assume control of the said Shea or the said work or any of the workmen engaged upon the said work or in any other respect whatever; that the said Shea was neither the agent nor the servant of this defendant, but was an independent contractor, taking said work as a job and as a whole for a definite, fixed, agreed sum, and this defendant was only interested in the result of the work, and not in any way in the means employed by the said Shea in its performance; that in making said contract with said Shea, by which he agreed and contracted to do the work of constructing a roadbed for the extension of certain tracks at Alexander, N. C., this defendant ascertained that the said Shea was a man of experience in the kind and character of work which by said contract he bound himself to perform, and he was in every way thoroughly competent and skilled, and this defendant knew when it employed the said Shea that he for a long time had been engaged in the performance of such work, and this defendant, before making and signing said contract, made due inquiries as to the capacity and reliability of the said Shea in respect of such work, and ascertained that he was both capable and trustworthy, and this defendant is advised, informed, and believes that the said blasting mentioned in the plaintiff's complaint was the blasting done by the said Shea and

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his employees and subcontractors while engaged in doing the work set out in the contract made between this defendant and the said Timothy Shea. This defendant never authorized the said Timothy Shea or any one else to resort to blasting in constructing the roadbed for the extension of the tracks at Alexander, or to use powder, dynamite, or any other unlawful agency in the performance of said work.

The following issues were submitted to the jury, who answered them as set out:

“(1) Was the death of plaintiff’s intestate caused by the negligence of the defendant Southern Railway Company, as alleged in the complaint? Answer: Yes.

“(2) What damages, if any, is plaintiff entitled to recover of defendant Southern Railway Company? Answer: \$2,000.”

Judgment was rendered for the plaintiff, and defendant appealed to this court.

Moore & Rollins, for appellant.

Craig, Martin & Thomason, Frank Carter, and H. C. Chedester, for appellee.

MANNING, J. In view of the verdict of the jury rendered under the charge of his honor, the following facts are established by the evidence: That in the month of April or May, 1906, the defendant, desiring to widen its roadbed at or near Alexander, in Buncombe county, and lay additional tracks or straighten its existing tracks, then used and having been used for many years, found it necessary to blast out a perpendicular cliff of rock, about 400 feet long and 42 feet high at its greatest height, situate on its right of way, and began the work of blasting down the cliff by its own employees. This continued two or three weeks. The plaintiff lived across the French Broad river with his wife and two small children, in the corporate limits of Alexander, and a quarter of a mile from the blasting. The result of defendant’s operations was to throw rocks of large and small size across the river in plaintiff’s yard, on his house and buildings, in his garden and field, and the blasting was of such violence that the window glass in plaintiff’s house was shaken out, and his wife much frightened and rendered very nervous. The plaintiff made frequent complaints, but to no avail. The defendant suspended operations by its own employees, and in June, 1906, made a contract with one Timothy Shea to continue the work, and complete it according to certain plans and specifications. He soon thereafter began work, and conducted it in the same manner as the defendant had done, and he and his foreman and other witnesses offered by the defendant testified that the work could be done in no other way. The results, in

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so far as it affected the plaintiff's wife and his premises, were the same. Rocks were constantly thrown with great force in and around his house. In the latter part of August plaintiff's wife was taken with typhoid fever. The violent blasting continued with its results. The effect upon plaintiff's wife was that she was kept in a highly nervous condition; that her condition was made known to the foreman in charge and the effect of the blasting and falling rock upon her; that the blasting continued up to three or four days before her death. The physician testified that, in his opinion, but for the blasting and the nervous condition and alarm produced by it upon Mrs. Hunter, she would have recovered. After making several efforts to have the blasting stopped, the plaintiff succeeded, with a threat of suit, on Thursday or Friday before his wife's death on the following Monday night, September 11, 1906. This action was begun October 4, 1906. The liability of the defendant was presented to the jury in this language, given substantially in accordance with one of the prayers of the defendant: "The court charges you that the act of blasting, as a means of excavation of a railroad in North Carolina, is not in itself negligence: that it is the recognized method of clearing the way of the railroad track, and the simple fact of the blasting making noise is not negligence, for that is the natural result of blasting. So that this, aside from the fact that rocks were thrown, if you find from the greater weight of the evidence that they were thrown, in the yard of the plaintiff, the court charges you that the noise of the blasting would not be negligence unless you find that after the contractor was notified of the sickness of Mrs. Hunter that he willfully and wantonly and negligently continued the blasting; that the simple act of blasting would not be negligence, and, if the result of it was to produce death even, the simple noise disassociated from the fact that if they had thrown any rocks in the yard, had produced her death, that would not be negligence for which the defendant would be liable, unless, as I say, it was done negligently, willfully, and wantonly, after notice on the part of the contractor." The defendant, however, contended that the vital error committed by his honor was his failure to give the following instruction: "The court charges the jury that under the terms of the contract introduced in evidence between the defendant Southern Railway Company and one Timothy Shea the relation of master and servant did not arise between them, but that the said Timothy Shea, under said contract, was an independent contractor, and anything done by said Timothy Shea under said contract he was responsible for, and not the Southern Railway Company." His honor held, and so charged the jury, that the contract created Timothy Shea an independent contractor, but declined to hold that that fact alone exonerated the defendant from liability to

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the plaintiff. In *Young v. Lumber Co.*, 147 N. C. 26, 60 S. E. 654, Mr. Justice Connor, speaking for the court, said: "When the contract is for something that may be lawfully done, and it is proper in its terms, and there has been no negligence in selecting a suitable person in respect to it, and no general control is reserved, either in respect to the manner of doing the work or the agents to be employed in doing it, and the person for whom the work is to be done is interested only in the ultimate result of the work and not in the several steps as it progresses, the latter is not liable to third persons for the negligence of the contractor as his master." This is quoted with approval in *Gay v. Lumber Co.*, 148 N. C. 336, 62 S. E. 436, from the opinion of Mr. Justice Walker in *Craft v. Lumber Co.*, 132 N. C. 157, 43 S. E. 597, and expresses with clearness the general doctrine. In both these cases, however, the exceptions are recognized as well settled which imposes liability upon the proprietor or owner for the acts of the independent contractor. In *Young v. Lumber Co.*, supra, it is said: "It is conceded that, upon grounds of public policy, certain exceptions are made by the law to the general rule. The one upon which plaintiff relies is well stated by Andrews, C. J., in *Engel v. Eureka Club*, 137 N. Y. 100, 32 N. E. 1052, 33 Am. St. Rep. 692: 'Where the thing contracted to be done is necessarily attended with danger, however skillfully and carefully performed, or is intrinsically dangerous, it is held that the party who lets the contract to do the act cannot thereby escape responsibility from any injury resulting from its execution, although the act to be performed may be lawful. But, if the act to be done may be safely done in the exercise of due care, although, in the absence of such care, injurious consequences to third persons would be likely to result, then the contractor alone is liable, provided it was his duty under the contract to exercise due care.'" In *Davis v. Summerfield*, 133 N. C. 325, 45 S. E. 654, 63 L. R. A. 492, the court, speaking through Mr. Justice Montgomery, says: "There is yet another class of cases where there is an exception to the exemption, and that is where the thing contracted to be done is necessarily attended with danger, however skillfully and carefully performed, said by Judge Dillon to be 'intrinsically dangerous.' There the employer cannot escape liability for an injury resulting from the doing of the work, although the act performed might be lawful." These rules by which is fixed the liability of the owner or proprietor for the acts of the independent contractor are stated in 2 Cooley on Torts (3d Ed.) p. 1090: "(1) If a contractor faithfully performs his contract, and the third person is injured by the contractor in the course of its due performance, or by its result, the employer is liable, for he causes the precise act to be done which occasions the injury; but for the negligence of the contractor not done under the contract, but in violation

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of it, the employer is, in general, not liable. (2) If I employ a contractor to do a job of work for me which, in the progress of its execution, obviously exposes others to unusual perils, I ought, I think, to be responsible on the same principle as in the last case, for I cause acts to be done which naturally expose others to injury. (3) If I employ as contractor a person incompetent or untrustworthy, I may be liable for injuries done to third persons by his carelessness in the execution of his contract. (4) The employer may be guilty of personal neglect, connecting itself with the negligence of the contractor in such manner as to render both liable." *Lawrence v. Shipman*, 39 Conn. 586; 1 *Thompson on Negligence*, §§ 652, 771; *Wetherbee v. Partridge*, 175 Mass. 185, 55 N. E. 894, 78 Am. St. Rep. 486; *Tiffin v. McCormack*, 34 Ohio St. 638, 32 Am. Rep. 408; *Railroad v. Morey*, 47 Ohio St. 207, 24 N. E. 269, 7 L. R. A. 701; *Hawver v. Whalen*, 49 Ohio St. 69, 29 N. E. 1049, 14 L. R. A. 828, and editor's note; *Thomas v. Harrington*, 72 N. H. 45, 54 Atl. 285, 65 L. R. A. 742, and editor's note; *Louisville & N. R. Co. v. Tow* (Ky.) 63 S. W. 27, 66 L. R. A. 941, and note. In *Wetherbee v. Partridge*, 175 Mass. 185, 55 N. E. 894, 78 Am. St. Rep. 486, the conclusion of the court is thus stated in the head-note: "At the trial of an action for injuries to the plaintiff's property by the blasting of rocks upon adjoining land of the defendant, what the defense relied on was that the work was done by an independent contractor. The contract contemplated that blasting would be done, and the place where it was done was within three or four feet of the line between the plaintiff's and the defendant's land, and about eight or nine feet from the plaintiff's house. Held, that it is plain that performance of the contract would do the damage complained of unless it was guarded against, and that the defendant was bound to see that due care was used to prevent harm." In the present case, from the evidence of the defendant, it was plain that performance of the contract would injure the plaintiff. The defendant by its own servants had first attempted to perform the work subsequently included in its contract with Shea—the independent contractor—and the injury to plaintiff was made plain. The independent contractor prosecuted the work in the same manner as the defendant had done, and testified it could be done in no other way, and he produced like results to the plaintiff. It therefore in our opinion results from the facts of this case that, whether we follow the New York rule (which this court in *Davis v. Summerfield*, *supra*, declined to follow, and the Massachusetts court in *Wetherbee v. Partridge*, *supra*, also declined to follow) or accept the doctrine of the cases cited, we must reach the conclusion that the defendant is liable under the evidence in this case.

The sole remaining question to be determined is whether

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plaintiff, as administrator of his wife, can recover damages for her wrongful death, or is he prevented because, as husband, he is entitled to her earnings, and she can accumulate nothing, and is valueless to her estate. We cannot yield our assent to this argument of the defendant. We are not prepared to so interpret our law that, under Lord Campbell's act, all the wives in the state could meet with a tortious and wrongful death, and yet, because the husbands are entitled to their earnings, the issue of damages must be answered, "Nothing." Nor can the defendant escape liability because the particular form of injury was not foreseen. "While the defendant could not foresee the exact consequence of his act, he ought, in the exercise of ordinary care, to have known that he was subjecting plaintiff and his family to danger, and to have taken proper precautions to guard against it." *Kimberly v. Howland*, 143 N. C. 398, 55 S. E. 778; *Hudson v. Railroad*, 142 N. C. 198, 55 S. E. 103; *Drum v. Miller*, 135 N. C. 208, 47 S. E. 421, 65 L. R. A. 890, 102 Am. St. Rep. 528; *Sawyer v. Railroad*, 145 N. C. 24, 58 S. E. 598, 22 L. R. A. (N. S.) 200; *Rolin v. Tobacco Co.*, 141 N. C. 300, 53 S. E. 891, 7 L. R. A. (N. S.) 335. A careful examination of the record and the brief of the learned counsel of the defendant has failed to discover to us any reversible error, and the judgment is affirmed.

No error.

KILEY v. CHICAGO, M. & ST. P. RY. CO.

(Supreme Court of Wisconsin, March 15 and 22, 1910.)

[125 N. W. Rep. 464.]

Appeal and Error—Law of the Case.—Where the constitutionality of an act is fully passed on in a prior appeal, that ruling becomes the law of the case, and is conclusive on the trial court and the appellate court.

Constitutional Law—Equal Protection of Laws—Injuries to Railroad Employees.*—Laws 1907, c. 254, imposing liability on railroad companies for injuries to their employees caused in whole or in greater part by the negligence of co-employees, etc., does not deprive railroads of the equal protection of the laws, since railway carriers, because of the peculiar and dangerous character of the business, should be and generally are subjected to special legislation affecting them alone.

Constitutional Law—Due Process of Law—Injuries to Railroad Employees.*—Laws 1907, c. 254, imposing liability on railroad com-

*For the authorities in this series on the subject of the constitutionality of employers' liability acts, see foot-note of *Missouri Pac. Ry. Co. v. Castle* (C. C. A.), 35 R. R. R. 436, 58 Am. & Eng. R. Cas., N. S., 436.

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panies for injuries to their employees, caused in whole or in greater part by the negligence of co-employees, etc., does not deny to railroads due process of law, since such classification is permissible by reason of the peculiar and dangerous character of the business.

Constitutional Law—Discrimination in Legislation.—The Legislature of the state, under the fourteenth amendment to the federal Constitution, and the Legislature of the United States, under the fifth amendment to the federal Constitution, are governed by the principle that there can be no discrimination in the laws except such as is based on just and proper classification.

Constitutional Law—Classification of Subjects—Subclassification.—Subclassification of a class is entirely permissible, but must be based on real distinctions germane to the purpose of the law, and suggesting at least the property of substantial difference in legislation.

Constitutional Law—Classification of Subjects—Right of Courts.—The question whether there is room or necessity for classification is one resting primarily with the Legislature, and no court is justified in declaring classification baseless unless it can say without doubt that no one could reasonably conclude that there is any substantial difference justifying different legislative treatment.

Constitutional Law—Legislative Classification—Revision by Court.—A classification is not to be concluded because the situation of certain individuals in one class may not differ materially from the situation of certain individuals in another class.

Constitutional Law—Subclassification—Injuries to Railroad Employees—Exceptions.—The exception in Laws 1907, c. 254, defining the liability of railroad companies for injuries to their employees, but excepting from the operation of the act office and shop employees, is proper because such employees are not subject to the same hazards as the other employees, and subclassification of a class is proper.

Appeal from Circuit Court, Brown County; Samuel D. Hastings, Judge.

Action by Michael Kiley against the Chicago, Milwaukee & St. Paul Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

See, also, 138 Wis. 215, 120 N. W. 756.

Greene, Fairchild, North & Parker and *Charles E. Vroman* (C. H. Van Alstine, of counsel), for appellant.

Minahan & Minahan, for respondent.

WINSLOW, C. J. This is an action against a railway company, brought by one of its employees to recover damages for the loss of his eye, occasioned by the negligent act of his co-employees while they were engaged in constructing a wire fence along the right of way. A general demurrer to the complaint was over-

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ruled, and that ruling affirmed by this court in 138 Wis. 215, 119 N. W. 309, 120 N. W. 756. Since that decision the action has been tried before a jury, and a special verdict returned finding that: (1) The staple which injured plaintiff's eye was thrown out of the post by reason of the wire being pulled or moved by plaintiff's co-employee, one Charapata; (2) a man of ordinary intelligence and prudence in Charapata's position ought to have reasonably anticipated that, by pulling or moving said wire without notifying plaintiff that he was about to do so, some such injury would result to plaintiff; (3) Charapata was guilty of negligence in so moving or pulling said wire without first notifying the plaintiff that he was about to do so; (4) a man in plaintiff's position should not have reasonably anticipated that a staple might be thrown out and cause him injury by the handling of the wire by the man next to him as the work was ordinarily carried on; (5) plaintiff's damages were \$2,000. The defendant, both by answer and by motion made at the opening of the trial, expressly made the contention that it was not liable, because chapter 254 of the Laws of Wisconsin for 1907, under which the action is brought, violates the fourteenth amendment to the Constitution of the United States, in that it deprives the defendant of property without due process of law, and denies to the defendant the equal protection of the laws. After the rendition of the verdict the defendant moved for judgment in its favor notwithstanding the verdict, also that the court set aside the affirmative answers to the first four questions of the verdict and substitute negative answers therefor, and render judgment for the defendant thereon, all of which motions being denied, judgment for the plaintiff was rendered on the verdict, and the defendant appeals.

As will appear from the foregoing statement, the jury upon trial of the action found exactly the state of facts alleged in the complaint, and the defendant upon this appeal makes no claim of error, save the claim that chapter 254 of the laws of 1907 is void because it violates the provisions of the fourteenth amendment to the federal Constitution. The same claim was fully argued, considered, and rejected upon the former appeal, and the result is conclusive, not only upon the trial court, but upon this court. Whether right or not, the conclusion then reached formed the law of this case, and when the same question was again presented, the court below could rightly do but one thing; i. e., follow the former decision. Any other holding would have been error. *Ellis v. Northern Pacific Ry. Co.*, 80 Wis. 459, 50 N. W. 397, 27 Am. St. Rep. 44; *Keystone Lumber Co. v. Kolman*, 103 Wis. 300, 79 N. W. 224. Such being the case, it is obvious that no error can now be predicated upon the action of the trial court. Perhaps we might well affirm the

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judgment upon the doctrine of *res adjudicata* without further remark; but, inasmuch as another case involving the same question has been submitted at the present assignment, we have re-examined the questions raised, and deem it proper to state again our conclusions upon the federal questions involved.

The fundamental question is the question of classification. If the law can only be viewed as a classification of laborers or employees, based upon the peculiar risks which men who operate trains necessarily meet, and which are not met by men who are employed by firms or corporations engaged in other occupations, then it may be admitted for the sake of the argument that the classification attempted in this law is indefensible, because in that case it should have been confined to those employees who meet such peculiar risks, namely, those engaged in or about the operation of trains, while the law (with two exceptions to be noticed later) in fact includes all classes of employees, many of whom meet no peculiar risk, but only the same risks which the employees of ordinary business concerns are daily meeting. It is not denied that a number of courts have condemned similar laws upon this very ground, notably the courts of Iowa and Minnesota, and it may be admitted that such was, for a time at least, the prevailing doctrine. It is to be noted that this court in the *Ditberner Case*, 47 Wis. 138, 2 N. W. 69, repudiated this doctrine, and upheld a law similar to the present law, in that it covered all employees, on the ground that it was valid exercise of the reserve power given to the Legislature to alter or repeal corporate charters. However, this court took a different view of the present statute when this case was here upon demurrer. It viewed the law as a law classifying railways common carriers, regulating their relations with their employees, and subjecting them to peculiar obligations and duties towards such employees. The law was sustained on the ground that it was entirely proper, and in fact a universally recognized principle, that railway carriers should be, and generally must be, subjected to special legislation affecting them alone; that this is so, not only on account of the unique dangers involved in the business, but as well on account of its public nature and the vast importance to the public at large of the careful conduct of the business, not merely in the handling of trains, but in the performance of well-nigh every act which an employee performs which is necessary to the carrying on of the business. Railway carriers from their very nature must, in large measure, be governed by laws peculiar to themselves, and such has been the character of railway legislation since the business began. The question is whether the regulation of their relations with their employees is within this general principle or not.

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It was noticed in one of the opinions upon the former appeal that, while the federal act which attempted to abolish the co-employee doctrine as to interstate carriers was held void in the Employer's Liability Cases, 207 U. S. 463, 28 Sup. Ct. 141, 52 L. Ed. 297, because it covered intrastate commerce, still it was broadly intimated in the opinion that, if the act applied to the District of Columbia and the territories only, it could not be questioned. This act attempted to impose on every common carrier a liability to any employee for damages resulting from the negligence of any of its officers, agents, or employees; thus it will be seen that it applied in terms, not merely to employees who are moving trains, but to all employees, and thus seems to be subject to the same objection as to improper classification which is now made to the Wisconsin statute. Since the former opinion in the present case was rendered, the question of the constitutionality of the federal act as applied to the District of Columbia and the territories has been brought before the United States Supreme Court in *El Paso & N. E. R. Co. v. Gutierrez*, 215 U. S. 87, 30 Sup. Ct. 21, 54 L. Ed. —, and the law has been held constitutional. It is true that the point now raised is not discussed in the opinion, but the decision certainly stands as a direct holding that a law making a common carrier liable for injuries to any employee resulting from the negligence of a co-employee is a valid law. While the fourteenth amendment only inhibits states from depriving persons of life, liberty, or property without due process of law, the same inhibition is placed upon the United States by the fifth amendment, and both state and national Legislatures are governed by the principle that there can be no discrimination in the laws except such as is based upon just and proper classification. Without attempting again to review the authorities which were reviewed upon the former appeal, we are content to rest this branch of the case upon the principle before stated, namely, that railway carriers, on account of the public character of their business, may properly be classified so far as their relations with their employees are concerned, whether such employees are moving trains or not, and may be made subject to liabilities and obligations greater than those imposed upon other employees of labor.

As to the provision exempting shop and office employees from the operations of the act, a different question arises. This is undoubtedly classification, or rather subclassification, of employees. Subclassification of a class is entirely permissible, but, like all other classification, it must be based upon real distinctions germane to the purpose of the law, and suggesting at least the propriety of substantial difference in legislation. On the other hand, the question whether there is room or necessity for classification is one resting primarily with the Legislature, and no court

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is justified in declaring classification baseless unless it can say without doubt that no one could reasonably conclude that there is any substantial difference justifying different legislative treatment. *State v. Evans*, 130 Wis. 381, 110 N. W. 241; *Servonitz v. State*, 133 Wis. 231, 113 N. W. 277, 126 Am. St. Rep. 955. Nor is classification to be condemned by the courts because the situation of certain individuals in one class may not differ materially from the situation of certain individuals in another class. Such is frequently the case. It is the class, considered broadly as a class, which must possess the distinguishing differences of situation calling for different legislation, not every individual in the class. *State v. Evans*, supra.

Bearing these well-established rules in mind, we still find ourselves unable to say that the classification which exempts shop and office employees from the provisions of the law passes the bounds of reason. Speaking generally of the shop and office employees as a class, they are in less danger from the negligence of co-employees, and perform duties less directly and vitally connected with the public safety than train employees and track repairers, who constitute a very large percentage of the other class, and we cannot say that the differences are not such as would justify a reasonable mind in concluding that they suggest the propriety of substantial difference in legislative treatment.

We deem it unnecessary to again discuss any other objections made to the law. We are content to leave all other objections as they were left by the former discussion.

Judgment affirmed.

TIMLIN, J., took no part.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Plff. in Err., v.
SPENCER MELTON.

(Argued April 28, 29, 1910. Decided May 31, 1910.)

[30 Sup. Ct. 676.]

Courts—Error to State Court—Frivolousness of Federal Question.—A writ of error to review a judgment of the highest court of a state will not be dismissed on the ground that the Federal question relied upon to confer jurisdiction has been so conclusively foreclosed by prior decisions of the Federal Supreme Court as to cause it to be frivolous, where analysis and exposition are necessary in order to make clear the decisive effect of such prior decisions upon the issue presented, and there is some conflict in the opinions of the various state courts of last resort upon the question, and a division of opinion in the court below.

Courts—Error to State Court—Federal Question—How Raised—Full Faith and Credit.—The full faith and credit clause of the Federal Constitution must be pleaded, or the attention of the court below directed to the fact that, in connection with the proper construction of a statute of another state, reliance was placed upon that clause, in order to present a Federal question for review in the Federal Supreme Court by writ of error to a state court.

Courts—Error to State Court—Federal Question—Full Faith and Credit.—The exercise by a state court of its independent judgment in interpreting the statute of another state upon which the cause of action is based can present no question under the full faith and credit clause of the Federal Constitution for review in the Federal Supreme Court by writ of error to a state court, where there is no local statute controlling the construction of statutes of other states, and no settled construction of the statute by the courts of the state enacting it is pleaded or proved.

Constitutional Law—Equal Protection of the Laws—Classification of Railway Employees—Police Power.*—The modification of the fellow-servant rule as to railway employees, made by Ind. act of March 4, 1893, § 1, does not offend against the equal protection of the laws clause of the Federal Constitution because construed as applying to all employees doing work essential to enable the carrying on of railway operations, and not as limited to those engaged in or about the movement of trains, but such general classification of railway employees is a proper exercise of the police power.

In error to the Court of Appeals of the State of Kentucky to review a judgment which affirmed a judgment of the Circuit Court of Hopkins County, in that state, in favor of plaintiff in

*See foot-note of preceding case.

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an action founded upon the Indiana employers' liability law. Affirmed.

See same case below, 127 Ky. 276, 105 S. W. 366, 110 S. W. 233, 112 S. W. 618.

The facts are stated in the opinion.

Messrs. Benjamin D. Warfield, Henry Lane Stone, Clifton J. Waddill, and Waddill & Dempsey, for plaintiff in error.

Messrs. James W. Clay, William L. Gordon, William J. Cox, Maurice K. Gordon, and J. F. Clay, for defendant in error.

MR. JUSTICE WHITE delivered the opinion of the court:

For personal injuries, Spencer Melton recovered a judgment against the plaintiff in error in the circuit court of Hopkins county, Kentucky. The court of appeals affirmed the judgment (127 Ky. 276, 105 S. W. 366, 110 S. W. 233, 112 S. W. 618), whereupon this writ of error was prosecuted.

Melton, a carpenter, was injured on March 21, 1905, while in the employ of the railway company. He was one of a construction crew, composed of a foreman and six men, who usually did what is described as bridge carpentering. On the date mentioned the crew was engaged, alongside the track of the railway company at Howell, Indiana, in constructing the foundation of a coal tipple at which the engines might coal. A bent or frame of timber, composed of heavy pieces fastened together, and intended to be used as part of the foundation of the tipple, which was lying flat upon the ground, was being raised for the purpose of placing it in the foundation. The lifting was accomplished by means of a block and tackle. A pulley was fastened by an iron chain to an upright piece of timber, and through the pulley a rope passed, which was attached at one end to the bent, so that, on hauling on the rope at the other end, the bent or frame was slowly lifted up. Most of the men were engaged in hauling on the rope, while the foreman and Melton, under his orders, were standing beneath the bent, and were engaged in placing props under the bent to prevent its lowering, when the strain upon the rope passing through the pulley was relaxed. While Melton was in this position a link of the chain which held the pulley at the top of the upright post broke, and the bent fell to the ground with Melton underneath, inflicting upon him serious and permanent injuries. The chain which broke was furnished by the foreman of the gang, and had been put in position under his directions.

Melton was a resident of Hopkins county, Kentucky, and he there commenced this action. The right to recover was based upon the charge that the injury was occasioned through the furnishing by the corporation of unsafe tools to do the work of raising the bent. Besides generally controverting the cause of

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the injuries, as alleged, the answer of the company set up the defenses of contributory negligence and assumption of the risk. Thereafter Melton was allowed to file an amendment to his petition. By the amendment it was substantially alleged that he was injured without any fault on his part, and solely owing to a defect in the condition of the works or tools connected with or in use in the business of the defendant, and that such defect was the result of negligence on the part of the foreman, who was the person intrusted with the duty of keeping such tools or works in a proper condition, and the accident was also charged to have been caused by the negligent orders of the foreman, to whose directions Melton was bound to conform. The sufficiency of the facts alleged to entitle to recovery was expressly based upon the provisions of the first and second subsections of § 1 of an act of the legislature of Indiana of March 4, 1893, known as the employers' liability statute, reading as follows:

"Sec. 1. Be it enacted by the general assembly of the state of Indiana, that every railroad . . . operating in this state shall be liable in damages for personal injury suffered by any employee while in its service, the employee so injured being in the exercise of due care and diligence, in the following cases:

"First. When such injury was suffered by reason of any defect in the condition of ways, works, plant, tools, and machinery connected with or in use in the business of such corporation, when such defect was the result of negligence on the part of the corporation, or some person intrusted by it with the duty of keeping such way, works, plant, tools, or machinery in proper condition.

"Second. Where such injury resulted from the negligence of any person in the service of such corporation, to whose order or direction the injured employee at the time of the injury was bound to conform, and did conform."

The court, on the motion of the railway company, having required Melton to determine whether to rely upon the common law or the statute, he elected to base his right to recover on the statute. Thereupon the railway company answered the amended petition, and therein stated as follows:

"Defendant says that the said Indiana statute pleaded cannot and does not apply to the facts of this case, and plaintiff cannot rely thereon; and that under the law of Indiana, as to the character of the work then in hand, the plaintiff was a fellow servant with the said foreman of the construction crew, for whose negligence the defendant is not liable."

Before trial, permission being granted, the railway company, by an additional amendment, defended on the ground that the Indiana statute relied upon, if held applicable to the facts alleged, was repugnant to the Constitution of Indiana and to the equal protection clause of the 14th Amendment. The averments

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on this subject were lengthy, and concluded as follows: "Defendant distinctly raises the Federal question that the said statute, in so far as made to apply to the facts in this case, is violative of said provision of the Constitution of the United States and void." The provision referred to, as shown by the context, was the equal protection clause of the 14th Amendment.

On the trial, counsel for the railway company offered as evidence of the common law of the state of Indiana on the subject of fellow servants the opinions of the supreme court of Indiana in the following cases: *New Pittsburgh Coal & Coke Co. v. Peterson* (filed October 31, 1893), 136 Ind. 398, 43 Am. St. Rep. 327, 35 N. E. 7; *Southern Indiana R. Co. v. Harrell* (filed October 9, 1903), 161 Ind. 689, 63 L. R. A. 460, 68 N. E. 262; *Indianapolis & G. Rapid Transit Co. v. Foreman* (filed January 29, 1904), 162 Ind. 85, 102 Am. St. Rep. 185, 69 N. E. 669.

At the close of the evidence for plaintiff, and also upon the conclusion of all the evidence, the railway company unsuccessfully moved the court to peremptorily instruct the jury to find in its favor for the following reasons:

"1. There is no evidence of actionable negligence proven.

"2. The Indiana statute upon which this action is based does not apply to the facts proven.

"3. In so far as the terms of the Indiana statute apply to the facts proven, they are unconstitutional and void. They are discriminatory against defendant and deny it the equal protection of the law. They are violative of the Constitution of Indiana and of § 1, article 14 of the Constitution of the United States, being § 1 of the 14th Amendment thereto.

"4. The said Indiana statutes were not intended to be enforced out of the state of Indiana, and are against the policy of the state of Kentucky, and not enforceable in a Kentucky forum."

The railway company, in its request for instructions, which were refused, and to which refusals it excepted, substantially asked that the general principles of the common law of Indiana as to fellow servant and assumption of the risk, as exemplified by the Indiana decisions which it had offered in evidence, be applied to the case. The court, on the contrary, in the instructions which it gave, substantially applied the provisions of the Indiana statute, as by it construed. In the motion for a new trial fifteen reasons were stated, those which made reference to the statute or to the Constitution of the United States being the following:

"14. The court erred in applying the Indiana statute to the facts of this case. The court erred in enforcing the Indiana statute in a Kentucky forum.

"15. The court erred in upholding and applying the Indiana statute pleaded in this case, when same, in so far as applicable to the facts proven in this case, is unconstitutional and void. It

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is discriminatory against defendant, and denies it the equal protection of the law. It is violative of the Constitution of the state of Indiana and of § 1 of article 14 of the Constitution of the United States, which guarantees to defendant the equal protection of the law."

The court below held that the supreme court of Indiana had construed the statute as applicable both to persons and corporations operating railroads. It further held that the statute embraced the case in hand because Melton came within the category of persons injured in the operation of a railroad, as "the construction of a coal tipple is * * * essential to the operation of a railroad." As thus construed, the repugnancy of the statute to the equal protection clause of the Constitution of the United States was considered. It was decided that, for the purpose of abrogating or modifying the common-law doctrine of fellow servant, it was competent for the lawmaking power of a state, without offending against the equal protection clause, to classify railroad employees because of the hazard attached to their vocation, and that a statute doing this need not be confined to employees who were engaged in and about the mere movement of trains, but could also validly include other employees doing work essential to be done to enable the carrying on of railroad operations. Thus, referring to the alleged distinction between railroad operatives engaged in train movement and those who were not, the court said:

"We are unable to see the force of this distinction. A railroad cannot be run without bridges; bridges cannot be built without carpenters. The work of a bridge carpenter on a railroad is perhaps no less perilous than the work of an operative on one of its trains. Coal tipples are no less essential to the operating of a railroad than bridges, because the engines cannot be operated without coal. The construction of a coal tipple is therefore essential to the operating of a railroad. As has been well said, the legislature cannot well provide for all subjects in one act. Legislation must necessarily be done in detail, and an act regulating railroads violates no constitutional provision because it is made to apply only to railroads. *Indianapolis Street R. Co. v. Kane*, 169 Ind. 25, 80 N. E. 841, 81 N. E. 721; *Schoolcraft v. Louisville & N. R. Co.* (*Louisville Safety Vault & T. Co. v. Louisville & N. R. Co.*) 92 Ky. 233, 14 L. R. A. 579, 17 S. W. 567; *Chicago, R. I. & P. R. Co. v. Stahley*, 11 C. C. A. 88, 27 U. S. App. 157, 62 Fed. 363; *Callahan v. St. Louis Merchants' Bridge Terminal R. Co.*, 170 Mo. 473, 60 L. R. A. 249, 94 Am. St. Rep. 746, 71 S. W. 208, 194 U. S. 628, 48 L. ed. 1157, 24 Sup. Ct. Rep. 857; *Georgia R. Co. v. Ivey*, 73 Ga. 504."

The railway company asked a rehearing for the sole purpose of a reconsideration of what was referred to as the very important Federal question involved, viz., "the unconstitutionality of

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the Indiana statute, as applied to the facts of this case." The court permitted the question whether a rehearing should be granted to be orally argued, and, after such argument, in a brief opinion denied the request. Two members of the court, however, dissented, on the ground that the statute as construed was repugnant to the equal protection clause of the 14th Amendment. This writ of error was then prosecuted, and the only reference to the Constitution of the United States made in the assignment of error filed with the application for the writ was that embraced in the contention that the Indiana statute could not be constitutionally applied to the facts without causing the statute to be repugnant to the 14th Amendment.

We primarily dispose of a motion to dismiss, which is rested upon the ground that the Federal question relied upon has been so conclusively foreclosed by prior decisions of this court as to cause it to be frivolous, and therefore not adequate to confer jurisdiction. The contention may not prevail, even although it be admitted that a careful analysis of the previous cases will manifest that they are decisive of this. We say this because, for the purpose of the motion to dismiss, the issue is not whether the Federal question relied upon will be found, upon an examination of the merits, to be unsound, but whether it is apparent that such question has been so explicitly foreclosed as to leave no room for contention on the subject, and hence cause the question to be frivolous. That this is not the case here we think results from the following considerations: (a) because analysis and expounding are necessary in order to make clear the decisive effect of the prior decisions upon the issue here presented; (b) because the division in opinion of the lower court as to whether the statute as construed was repugnant to the equal protection clause of the 14th Amendment suggests that the controversy on the subject here presented should not be treated as of such a frivolous character as not to afford ground for jurisdiction to review the action of the court below; and (c) because, while an examination of the opinions of state courts of last resort will show that there is unanimity as to the power, consistently with the equal protection of the law clause, to classify railroad employees actually engaged in the hazardous work of moving trains, such examination will also disclose that there is some conflict of view as to whether a statute on that subject as broad as is the statute under review, as construed below, is consistent with the clause, thus additionally serving to point to the necessity of analyzing and considering the subject anew instead of treating it as being so obviously foreclosed as not to permit an examination of the subject.

Coming to the merits, we at once promise that we are not concerned with the construction affixed by the court below to the Indiana statute, unless it be that that construction offends

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against some Federal right properly asserted and open to our consideration. In the argument at bar in behalf of the railway company two rights of this character are insisted upon. First, it is said that the court below, in applying the statute, has caused it to embrace a class of employees which the statute did not include, and thereby gave it a wrongful construction, in violation of the full faith and credit clause of the Constitution of the United States. Second, that, in any event, the statute as construed is repugnant to the equal protection clause of the 14th Amendment. We separately dispose of these propositions.

The full faith and credit clause. The contentions as to this proposition rest upon the assumption that it has been conclusively settled by the supreme court of Indiana that the statute only changed the general rule prevailing in that state in respect to the doctrine of fellow servant as to railroad employees actually engaged in the hazard of train service, and therefore did not include an employee engaged in the character of work which Melton was performing when injured, and that to give the statute a contrary meaning was to violate the full faith and credit clause. If, however, the premise upon which the proposition rests, and the legal deduction based upon that premise, be, for the sake of the argument, conceded, the contention is, nevertheless, without merit, because of the failure of the railway company to plead or in any adequate way call the attention of the court below to the fact that, in connection with the proper construction of the statute, the benefit of the due faith and credit clause of the Constitution of the United States was relied on. We say this because the statement which we have previously made of the case fails to show from first to last, even up to and including the application for rehearing, the assertion of any claim to the protection of the full faith and credit clause. Indeed, that statement not only shows a failure to make claim, but discloses such direct and express action on the part of the railway company as justly to give rise to the inference that a reliance upon any claim of Federal right resulting from the full faith and credit clause was not thought to be involved in the case. We say this because the frequent and reiterated assertions of Federal right, based solely upon the equal protection clause of the 14th Amendment, sustain such conclusion.

Further, even if, for the sake of the argument only, the failure to plead the full faith and credit clause, or to direct the attention of the court below to the fact that reliance was placed upon that clause, could be supplied upon the theory that, as the cause of action was based upon an Indiana statute, by implication the due faith and credit clause was necessarily involved, nevertheless the contention would be without merit. This follows because, as pointed out in *Finney v. Guy*, 189 U. S. 335, 340, 47 L. ed. 839, 843, 23 Sup. Ct. Rep. 558, and *Allen v. Allegheny*

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Co., 196 U. S. 458, 463, 49 L. ed. 551, 555, 25 Sup. Ct. Rep. 311, it is not true to say that necessarily in every case where the court of one state is called upon to determine the proper construction of a statute of another state, a question under the Constitution of the United States arises. Although the Indiana statute was at issue and its meaning was necessarily involved, the duty of construing it rested upon the court below. The general rule is that, in the absence of a statute to the contrary, if a settled construction by the court of last resort of a state enacting a statute is relied upon to control the judgment of the court of another state in interpreting the statute, such settled construction must be pleaded and proved. *Eastern Bldg. & L. Asso. v. Ebaugh*, 185 U. S. 114, 46 L. ed. 830, 22 Sup. Ct. Rep. 566, and cases cited. As, however, it is not asserted that there was a statute of Kentucky controlling the courts of that state in construing the statutes of other states, and as there was no pleading or proof as to the existence of any such settled construction, it follows that there is nothing presented, which can be held to have deprived the court below of its power to exercise its independent judgment in interpreting the statute. Our duty, of course, is confined to determining whether error was committed by the court below as to the Federal questions involved; and as it is impossible to predicate error as to matters not pleaded or proved in the court below, which were essential to be pleaded and proved, it follows that the contention concerning the denial of the protection of the full faith and credit clause furnishes no ground for reversal. *Johnson v. New York L. Ins. Co.*, 187 U. S. 491, 495, 47 L. ed. 273, 274, 23 Sup. Ct. Rep. 194.

The equal protection of the law clause. That the 14th Amendment was not intended to and does not strip the states of the power to exert their lawful police authority is settled and requires no reference to authorities. And it is equally settled—as we shall hereafter take occasion to show—as the essential result of the elementary doctrine that the equal protection of the law clause does not restrain the normal exercise of governmental power, but only abuses in the exertion of such authority, therefore that clause is not offended against simply because, as the result of the exercise of the power to classify some inequality may be occasioned. That is to say, as the power to classify is not taken away by the operation of the equal protection of the law clause, a wide scope of legislative discretion may be exerted in classifying without conflicting with the constitutional prohibition.

It is beyond doubt foreclosed that the Indiana statute does not offend against the equal protection clause of the 14th Amendment, because it subjects railroad employees to a different rule as to the doctrine of fellow servant from that which prevails as to other employments in that state. *Tullis v. Lake Erie & W. R.*

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Co., 175 U. S. 348, 44 L. ed. 192, 20 Sup. Ct. Rep. 136; *Pittsburg, C. C. & St. L. R. Co. v. Ross*, 212 U. S. 560, 53 L. ed. 652, 29 Sup. Ct. Rep. 688. But while conceding this, the argument is that classification of railroad employees for the purpose of the doctrine of fellow servant can only, consistently with equity and uniformity, embrace such employees when exposed to dangers peculiarly resulting from the operation of a railroad, thus affording ground for distinguishing them for the purpose of classification from coemployees not subject to like hazards or employees engaged in other occupations. The argument is thus stated: "Plaintiff in error does not question the right of the legislature of Indiana to classify railroads in order to impose liability upon them for injuries to their employees incident to railroad hazards, but it does insist that, to make this a constitutional exercise of legislative power, the liability of the railroads must be made to depend upon the character of the employment, and not upon the character of the employer." Thus stated, the argument tends to confuse the question for decision, since there is no contention that the statute as construed bases any classification upon some supposed distinction in the person of the employer. The idea evidently intended to be expressed by the argument is, that although, speaking in a general sense, it be true that the hazards arising from the operation of railroads are such that a classification of railroad employees is justified, yet, as in operating railroads some employees are subject to risks peculiar to such operation, and others to risks which, however serious they may be, are not, in the proper sense, risks arising from the fact that the employees are engaged in railroad work, the legislative authority in classifying may not confound the two by considering in a generic sense the nature and character of the work performed by railroad employees collectively considered, but must consider and separately provide for the distinctions occasioned by the varying nature and character of the duties which railroad operatives may be called upon to discharge. In other words, reduced to its ultimate analysis the contention comes to this: that by the operation of the equal protection clause of the 14th Amendment, the states are prohibited from exerting their legitimate police powers upon grounds of the generic distinction obtaining between persons and things, however apparent such distinction may be; but, on the contrary, must legislate upon the basis of a minute consideration of the distinctions which may arise from accidental circumstances as to the persons and things coming within the general class provided for. When the proposition is thus accurately fixed, it necessarily results that in effect it denies the existence of the power to classify, and hence must rest upon the assumption that the equal protection clause of the 14th Amendment has a scope and effect upon the lawful authority of the states contrary to the doctrine maintained by this court without deviation. This follows, since the necessary

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consequence of the argument is to virtually challenge the legislative power to classify, and the numerous decisions upholding that authority. To this destructive end it is apparent the argument must come, since it assumes that however completely a classification may be justified by general considerations, such classification may not be made if inequalities be detected as to some persons embraced within the general class by a critical analysis of the relation of the persons or things otherwise embraced within the general class. A brief reference to some of the cases dealing with the power of a state to classify will make the error of the contention apparent.

In *Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 294, 42 L. ed. 1043, 18 Sup. Ct. Rep. 594, while declaring that the power of a state to distinguish, select, and classify objects of legislation was, of course, not within limitation, it was said, "necessarily this power must have a wide range of discretion." After referring to various decisions of this court, it was observed:

"There is therefore no precise application of the rule of reasonableness of classification, and the rule of equality permits many practical inequalities. And necessarily so. In a classification for governmental purposes there cannot be an exact exclusion or inclusion of persons and things."

Again considering the subject in *Orient Ins. Co. v. Daggs*, 172 U. S. 557, 43 L. ed. 552, 19 Sup. Ct. Rep. 281, it was reiterated that the legislature of a state has necessarily a wide range of discretion in distinguishing, selecting, and classifying, and it was declared that it was sufficient to satisfy the demand of the Constitution if a classification was practical, and not palpably arbitrary.

In *Minnesota Iron Co. v. Kline*, 199 U. S. 593, 50 L. ed. 322, 26 Sup. Ct. Rep. 159, a statute of Minnesota, providing that the liability of railroad companies for damages to employees should not be diminished by reason of accident occurring through the negligence of fellow servants, was held not to discriminate against any class of railroads, or to deny the equal protection of the laws because of a proviso which excepted employees engaged in construction of new and unopened railroads. In the course of the opinion the court said (p. 598): "The whole case is put on the proviso, and the argument with regard to that is merely one of the many attempts to impart an overmathematical nicety to the prohibitions of the 14th Amendment." These principles were again applied in *Martin v. Pittsburg & L. E. R. Co.*, 203 U. S. 284, 51 L. ed. 184, 27 Sup. Ct. Rep. 100, 8 A. & E. Ann. Cas. 87, and the doctrines were also fully considered and reiterated at this term in *Southwestern Oil Co. v. Texas*, 217 U. S. 114, ante, 496, 30 Sup. Ct. Rep. 496.

• And coming to consider the concrete application made of these general principles in the decisions of this court which have construed the statute here in question, and statutes of the same gen-

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eral character enacted in states other than Indiana, we think, when rightly analyzed, it will appear that they are decisive against the contention now made. It is true that in the Tullis Case, which came here on certificate, the nature and character of the work of the railroad employee who was injured was not stated, and that reference in the course of the opinion was made to some state cases, limiting the right to classify to employees engaged in the movement of trains. But that it was not the intention of the court to thereby intimate that a classification, if not so restricted, would be repugnant to the equal protection clause of the 14th Amendment, will be made clear by observing that the previous case of *Chicago, K. & W. R. Co. v. Pontius*, 157 U. S. 209, 39 L. ed. 675, 15 Sup. Ct. Rep. 585, was cited approvingly, in which, under a statute of Kansas classifying railroad employees, recovery was allowed to a bridge carpenter employed by the railroad company, who was injured while attempting to load timber on a car. And in the opinion in the Pontius case there was approvingly cited a decision of the court of appeals of the eighth circuit (*Chicago, R. I. & P. R. Co. v. Stahley*, 11 C. C. A. 88, 27 U. S. App. 157, 62 Fed. 362), wherein it was held that, under the same statute, an employee injured in a roundhouse while engaged in lifting a driving rod for attachment to a new engine could recover by virtue of the statute. All this is made plainer by the ruling in *St. Louis Merchants' Bridge Terminal R. Co. v. Callahan*, 194 U. S. 628, 48 L. ed. 1157, 24 Sup. Ct. Rep. 857, where upon the authority of the Tullis case, the court affirmed a judgment of the supreme court of Missouri, which held that recovery might be had by a section hand upon a railroad, who, while engaged in warning passersby in a street beneath an overhead bridge, was struck by a tie thrown from the structure.

While, as we have previously said, it is true there are state decisions dealing with statutes classifying railroad employees sustaining the restricted power to classify which is here insisted upon, we do not think it is necessary to review them or to notice those tending to the contrary. They are referred to in the opinions rendered in the court below. Nor do we think our duty in this respect is enlarged because, since the judgment below was rendered, the court of last resort in Indiana (*Indianapolis Traction Co. v. Kinney*, 171 Ind. 612, — L. R. A. (N. S.). —, 85 N. E. 954, and *Cleveland, C. C. & St. L. R. Co. v. Folland*, decided April 20, 1910, 91 N. E. 594) has, upon the theory that it was necessary to save the statute in question from being declared repugnant to the equality clause of the state Constitution and the 14th Amendment, unequivocally held that the statute must be construed as restricted to employees engaged in train service.

Affirmed.

CANADIAN PAC. RY. CO. v. MOOSEHEAD TELEPHONE CO.

(Supreme Judicial Court of Maine, Jan. 31, 1910.)

[76 Atl. Rep. 885.]

Telegraphs and Telephones—Right of Telephone Company to Erect Lines on Railroad Right of Way.—The legislature has the power to authorize a telephone corporation to construct its lines upon the right of way of a railroad corporation.

Telegraphs and Telephones—Right to Erect Telephone Lines on Railroad Right of Way.*—The right of a telephone line to construct its lines upon the right of way of a railroad company is not to be presumed from a grant of a general power of eminent domain. Such a right exists only when granted expressly or by necessary implication.

Telegraphs and Telephones—Right to Erect Telephone Poles on Railroad Right of Way.—When a telephone company is authorized by statute, as by Rev. St. c. 55, § 24, to construct and maintain its lines "upon or along a railroad," it is necessarily implied that it may "take" the right of way so far as is reasonably necessary for that purpose.

Eminent Domain—Taking Property—Compensation.†—The location of a telephone line upon a railroad right of way is a taking of it, and imposes a burden upon it for which the owner of the fee and the owner of the easement of the right of way are entitled to compensation; and the Legislature cannot constitutionally authorize such a location, unless it makes provision for that just compensation which the Constitution secures when private property is taken for public uses.

Eminent Domain—Taking Property—Compensation—Injunction.—Rev. St. c. 55, § 24, provides that a telephone company "may construct a line upon or along any railroad by the written permit of the person or corporation operating such railroad, but in case such company cannot agree with the parties operating such railroad, as to constructing lines along the same, or as to the manner in which lines may be constructed upon, along or across the same, either party may apply to the railroad commissioners, who, after notice to those interested, shall hear and determine the matter and make their award in relation thereto, which shall be binding upon the parties;" but it makes no provision for compensation to the owner of the fee or

*For the authorities in this series on the subject of the right to condemn a railroad right of way for telegraph or telephone lines, see foot-note of *Western Union Tel. Co. v. Pennsylvania R. Co.* (U. S.), 15 R. R. R. 479, 38 Am. & Eng. R. Cas., N. S., 479.

†For the authorities in this series on the question of the damages recoverable where portion of a railroad right of way is condemned for a telegraph or telephone line, see foot-note of *Atlantic Coast Line R. Co. v. Postal Telegraph Cable Co.* (Ga.), 14 R. R. R. 643, 37 Am. & Eng. R. Cas., N. S., 643.

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of the railroad right of way. Acting under this statute, the railroad commissioners, upon the defendant's petition, granted it the right to construct its lines upon the plaintiff's right of way. The defendant's lines were constructed accordingly. The defendant had instituted no condemnation proceedings against the railroad land under Rev. St. c. 55, § 11, which provides that a telephone company "may purchase, or take and hold as for public purposes, land necessary for the construction and operation of its lines," and that "land may be so taken and damages therefor may be estimated, secured, determined and paid for as in case of railroads." Upon these facts it is held that the defendant is unlawfully maintaining its telephone line upon the plaintiff's right of way, and that the plaintiff is entitled to an injunction.

Report from Supreme Judicial Court, Piscataquis County.

Bill in equity by the Canadian Pacific Railway Company against the Moosehead Telephone Company, to enjoin the defendant telephone company from maintaining its poles and wires upon the plaintiff's right of way. The defendant answered, and the cause was then heard on bill, answer, and evidence, and at the conclusion of the evidence the case was reported. Bill sustained and injunction granted.

Argued before WHITEHOUSE, SAVAGE, PEABODY, SPEAR, and CORNISH, JJ.

E. C. Ryder, for plaintiff.

Hudson & Hudson, for defendant.

SAVAGE, J. By this bill in equity the plaintiff seeks to enjoin the defendant telephone company from maintaining its line of poles and wires upon the plaintiff's right of way. The defendant contends that it is so maintaining them under statute authority. The case comes up on report.

The defendant corporation was organized in 1900 under the general law for the organization of telephone companies. St. 1895, c. 103. But it does not appear to have taken any steps affecting the plaintiff's right of way until 1904. Its right to do so, therefore, must be determined by the statutes in force in 1904. Chapter 378 of the Public Laws of 1885, and chapter 103 of the Public Laws of 1895, which are cited by the defendant as the source of its authority, except so far as incorporated in the revision of 1903, were expressly repealed by the general repealing act in the present Revised Statutes (page 1015). The defendant's right, if any, must be found in chapter 55 of the Revised Statutes. Section 24 of that chapter provides that "such [telephone] company * * * may construct a line upon or along any railroad by the written permit of the person or corporation operating such railroad, but in case such com-

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pany cannot agree with the parties operating such railroad, as to constructing lines along the same, or as to the manner in which lines may be constructed upon, along or across the same, either party may apply to the railroad commissioners, who, after notice to those interested, shall hear and determine the matter and make their award in relation thereto, which shall be binding upon the parties."

In 1904 the defendant, alleging that it could not agree with the plaintiff railway company as to the construction, maintenance, and operation of its line along the plaintiff's right of way, and that the plaintiff had unreasonably refused its consent, petitioned the railroad commissioners, as provided in section 24, which we have quoted, to determine the manner in which its line should be constructed, maintained, and operated along the plaintiff's right of way. Upon this petition, after hearing, the railroad commissioners in terms granted the defendant the right to construct, maintain, and operate its telephone line upon the plaintiff's right of way between Greenville Junction and Holeb Station, and prescribed the manner in which the line should be constructed. Thereafter the defendant constructed and has since maintained a telephone line of poles and wires upon the plaintiff's right of way, in accordance with the decree of the railroad commissioners.

The plaintiff contends: (1) That the right to construct and maintain a telephone line over its right of way can be acquired, in invitum, only by an express and explicit grant of the right of eminent domain for that purpose; (2) that section 24 of chapter 55 of the Revised Statutes, under which the defendant justifies, does not contain any such express and explicit grant; and, if it does, (3) that it makes no provision for compensation to the railroad for the land taken, and is therefore unconstitutional.

It is not denied that the Legislature has power to enable a telephone corporation to construct its lines upon the right of way of a railroad corporation. *Eastern R. R. Co. v. Boston & Maine R. R.*, 111 Mass. 125, 15 Am. Rep. 13; *Postal Tel. Co. v. Oregon, etc., R. R. Co.*, 23 Utah, 474, 65 Pac. 735, 90 Am. St. Rep. 705; *Lewis on Eminent Domain*, § 269. It should be observed that Mr. Lewis, when he says in the section just cited that "a telegraph may be established along a railroad right of way, it being no material interference with the use for railroad purposes," is speaking of the right of condemnation with compensation, and not of the right of using without condemnation or compensation. But it is claimed that the right in such cases is not to be presumed from a grant of a general power of eminent domain, and that it exists only when granted expressly or by necessary implication. Such is the general rule. *Housatonic, etc., R. R. Co. v. L. & H. R. R. Co.*, 118 Mass. 391; *Prov. &*

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Worcester R. R. Co., Pet'r, 17 R. I. 324, 21 Atl. 965; Lewis, Em. Dom. § 267; 15 Cyc. 623.

But we think that, so far as the question of authority is concerned, when a telephone company is authorized by statute to construct and maintain its lines "upon or along a railroad," it is necessarily implied that it may "take" the right of way so far as is reasonably necessary for that purpose. The use of words like "take," or "take and hold," is not essential. If it so constructs its lines, it necessarily so far takes the right of way, and authority to "construct" is necessarily an authority to "take." St. L. & C. R. R. Co. v. Postal Telegraph Co., 173 Ill. 508, 51 N. E. 382; Postal Telegraph Cable Co. v. Farmville & Powhattan R. R., 96 Va. 661, 32 S. E. 468; So. Carolina, etc., R. R. Co. v. American Tel. Co., 65 S. C. 459, 43 S. E. 970; 15 Cyc. 625. This differs from the use of the general words "to take and hold" land, from which no necessary implication arises that the power may be exercised upon land already devoted by the state to public uses, in that the statute explicitly authorizes the using, and therefore the taking, of a railroad right of way.

But, while the power of the Legislature is plenary in this respect, it cannot constitutionally exercise this power unless it makes provision for that just compensation which the Constitution secures when private property is taken for public uses. Const. art. 1, § 21. The location of a telephone line upon a railroad right of way is a taking of it, and imposes a burden upon it for which the owner is entitled to compensation. At. & P. Tel. Co. v. Ch., R. I. & P. R. Co., 6 Biss. 158, Fed. Cas. No. 632; Am. Tel. Co. v. Smith, 71 Md. 535, 18 Atl. 910, 7 L. R. A. 200; Southwestern R. R. Co. v. Southern & A. Tel. Co., 46 Ga. 43, 12 Am. Rep. 585; Mercantile Trust Co. v. At. & P. R. R. Co. (C. C.) 63 Fed. 513; Postal Tel. Co. v. Oregon, etc., R. R. Co., 23 Utah, 474, 65 Pac. 735, 90 Am. St. Rep. 705; Lewis, Em. Dom. § 141a; 2 Wood on Railroads, 864. Though the railroad property is devoted to public uses, the owner of the right of way has a private right of property which is protected. At. & P. Tel. Co. v. Ch., R. I. & P. R. Co., 6 Biss. 158, Fed. Cas. No. 632; Southwestern R. R. Co. v. Southern & A. Tel. Co., 46 Ga. 43, 12 Am. Rep. 585. And this is true, whether it owns the land in fee, or merely the easement of a right of way. Lewis, Em. Dom. § 141a; 2 Wood on Railroads, 864; At. & P. Tel. Co. v. Ch., R. I. & P. R. Co., 6 Biss. 158, Fed. Cas. No. 632. The principle is the same as when a highway is authorized to be laid out across a railroad (Old Colony & Fall River R. R. Co. v. County of Plymouth, 14 Gray [Mass.] 155); or when one railroad is authorized to cross another (Mass. Cent. R. R. Co. v. B., C. & F. R. R. Co., 121 Mass. 124; Lake Shore, etc., R. R. Co. v. Cincinnati, etc., R. R. Co., 30 Ohio St. 604; Ch. & A. R. R. Co. v. Joliet, etc., R. R. Co., 105 Ill. 388, 44 Am. Rep. 779).

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It is not an objection to the application of the principle that the damages are merely nominal. The railroad company has a right to be heard upon that question.

It follows that the statutory authority to construct its line on the plaintiff's right of way, under which the defendant claims to have acted, was nugatory, unless the statute itself, or some other statute so connected with it as to be regarded as in *pari materia* with it, made provision for compensation to the defendant. *Lewis*, Em. Dom. § 452; *Cushman v. Smith*, 34 Me. 247; *Thacher v. Dartmouth Bridge*, 18 Pick. (Mass.) 501.

It is very clear that section 24 of chapter 55 of the Revised Statutes upon which the defendant bases its authority, makes no provision for compensation. Under that section the railroad commissioners had power only to determine as to constructing the line and the manner thereof. There is no word which relates to compensation.

The defendant, however, contends that this omission is supplied by section 11 of the same chapter, which provides that a telephone company "may purchase, or take and hold as for public purposes, land necessary for the construction and operation of its lines. Land may be so taken and damages therefor may be estimated, secured, determined and paid for as in case of railroads." The answer to this proposition is that it is manifest that the defendant has not proceeded, nor has it attempted to proceed, under section 11. It has not taken the land by any legal proceeding contemplated by that section, for it has not pursued any of the steps required in the case of railroads. Rev. St. c. 51, § 31. The general power to take lands granted by section 24 would not, as we have already seen, be sufficient to authorize the defendant to construct its lines upon the plaintiff's right of way. But if it is considered, which we do not decide, that section 24 is to be interpreted in connection with section 11, and that, so interpreted, section 24 supplies the authority to construct upon the railroad's right of way, which is wanting in section 11, and that section 11 supplies the compensation features which are wanting in section 24, it still remains true that the telephone company must, by proper condemnation proceedings under section 11, "take" the right of way and pay the compensation, to be ascertained as in the case of railroads. This it has not done and could not do under section 24, under which alone it has acted.

The result is that the defendant is unlawfully maintaining its telephone line upon the plaintiff's right of way; and in such case injunction is an appropriate remedy. *Lewis on Eminent Domain*, § 452, and cases cited. See, also, *Peirce v. Bangor*, 105 Me. 413, 74 Atl. 1039.

Lastly, it is contended that the plaintiff is barred by laches. If this point were otherwise tenable against the plaintiff's clear

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legal right, it is sufficient to say that the record in this case discloses no facts which warrant its application. The case does not show when the telephone line was constructed. But it shows that at the hearing before the railroad commissioners in 1904 the plaintiff protested against the defendant's procedure under section 24. It objected to the construction of the line later. It does not appear to have slept upon its rights. Its claim is neither stale nor inequitable.

Bill sustained, with costs. Writ of permanent injunction to issue as prayed for.

SHELDON v. MICHIGAN CENT. R. Co. et al.

(Supreme Court of Michigan, June 6, 1910.)

[126 N. W. Rep. 1056.]

Adverse Possession—Continuity—Tacking Successive Possession.*—Where a right of way was conveyed to a railroad company of 50 feet on each side of the center of the track, and the company fenced in 25 to 30 feet on each side of the track, adverse possession of successive owners of an adjoining tract cannot be tacked to complete title, in the absence of a parol agreement by the prior owner giving the subsequent owner the right to the possession of the disputed tract, and where the deed between them excepted the right of way conveyed to the railroad company.

Adverse Possession—Evidence—Presumption.—Adverse possession must be strictly construed, and every presumption is in favor of the true owner, and that the claimant entered under his deed, and that his possession is only coextensive with his title and restricted by the premises described in the deed.

Railroads—Right of Way—Abandonment—Evidence.†—That a railroad company fenced in only 50 or 60 feet of its right of way of 100 feet is no evidence of abandonment of the portion not fenced.

Boundaries—Establishment—Boundary Agreements.—Where a right of way of 50 feet on each side of the track was granted to a railroad company, and the company fenced in 25 to 30 feet on each

*For the authorities in this series on the question whether title can be acquired against a railroad company by adverse possession, see foot-note of *Northern Pac. Ry. Co. v. Devine* (Wash.), 33 R. R. 95, 56 Am. & Eng. R. Cas., N. S., 95; *St. Louis & S. F. R. Co. v. Ruttan* (Ark.), 33 R. R. 96, 56 Am. & Eng. R. Cas., N. S., 96; first foot-note of *Southern Ry. Co. v. Gossett* (S. Car.), 29 R. R. 502, 52 Am. & Eng. R. Cas., N. S., 502.

†For the authorities in this series on the question what constitutes an abandonment of a railroad right of way, see foot-note of *Enfield Mfg. Co. v. Ward* (Mass.), 19 R. R. 600, 42 Am. & Eng. R. Cas., N. S., 600; *Stannard v. Aurora, etc., Ry. Co.* (Ill.), 18 R. R. 685, 41 Am. & Eng. R. Cas., N. S., 685.

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side of the track, there being no dispute as to the boundary between the right of way and an adjoining tract, nor any agreement to settle a disputed boundary, the railroad company cannot be said to have intended the fence as a line fence, nor acquiesced in its location as boundary.

Railroads—Right of Way—Abandonment—Equitable Estoppel—Acquiescence.—A railroad company inclosing 25 to 30 feet on each side of the track, though its right of way extended 50 feet on each side, was not estopped to deny title of an adjoining proprietor to the part of the right of way outside the fence, where it was not guilty of fraud and held out no inducement to enter into possession of the right of way, and deeds of the adjoining property excepted the right of way.

Estoppel—Pleading—Necessity.—Where a complainant's claim of title to part of a right of way conveyed to a railroad company is based on adverse possession, he cannot assert an equitable estoppel, since such an estoppel must be pleaded.

Appeal and Error—Disposition of Cause—Reversal—Rendition of Judgment.—In a suit to quiet title, based on adverse possession, where the decree of the lower court in favor of complainant is reversed and the title held to be in defendants, but complainant and those under whom he claims have been allowed to take possession of the disputed tract probably in the mistaken belief that they owned it, and there is no evidence in the record of the value of the improvements which the complainant has placed upon the tract, the bill of complaint will be dismissed, and the defendants' title to the premises quieted on condition that complainant be permitted to remove any buildings he or his grantors may have erected on the tract.

Moore, J., dissenting.

Appeal from Circuit Court, Cheboygan County, in Chancery; Frank Shepherd, Judge.

Suit by Frank R. Sheldon against the Michigan Central Railroad Company and another. From a decree in favor of complainant, defendants appeal. Reversed, and decree rendered for defendants upon condition.

Argued before MONTGOMERY, C. J., and GRANT, OSTRANDER, HOOKER, MOORE, MCALVAY, BROOKE, BLAIR, and STONE, JJ.

Frost & Sprague, for appellants.

Benjamin & Quay, for appellee.

STONE, J. It appears from the pleadings and proofs in this case that the complainant is the owner of lot 16 in block 2 in R. Patterson's First addition to the village (now city) of Cheboygan, county of Cheboygan, excepting, however, all that part of the above-described piece or parcel of land heretofore conveyed

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by Stanislaus Legault and wife to the Jackson, Lansing & Saginaw Railroad Company by deed dated the 18th day of September, 1880. The defendant Jackson, Lansing & Saginaw Railroad Company, a corporation, is the owner of a railroad right of way in a side, or spur, track running from the main line, to what is known as the "McArthur Dock." The defendant the Michigan Central Railroad Company is lessee of the railroad right of way of the Jackson, Lansing & Saginaw Railroad Company. The Jackson, Lansing & Saginaw Railroad Company's title to the right of way across complainant's land is evidenced by two deeds, one a quitclaim from Robert Patterson and wife, dated September 15, 1880, and recorded April 1, 1885, and the other a warranty deed from Stanislaus Legault and wife, dated September 18, 1880, and recorded April 1, 1885. These deeds grant to the defendant Jackson, Lansing & Saginaw Railroad Company 100 feet in width, 50 feet on each side of the center line of the route of said spur track as the same had been surveyed, laid out, and located upon and across said lot and other lands mentioned in said deeds. The last-named railroad company, about the year 1881, built a fence inclosing a part of this right of way along the entire length of this spur track. Instead, however, of building its fence 50 feet from the center of the railroad track, as surveyed and laid out, it built fences on each side of the spur track, some 25 or 30 feet from the center.

It is the claim of the complainant that the fence on the easterly side of defendants' right of way formed the westerly boundary of his lot, and other lots in the immediate neighborhood. Tracing the title from Stanislaus Legault and wife down to complainant through mesne conveyances, we have the following: A warranty deed from Stanislaus Legault and wife to Gilbert Joslin, dated June 29, 1881, duly recorded, of lot 16 in block 2 in R. M. Patterson's First addition to the village of Cheboygan according to the plat thereof, except, however, that part of said above-described pieces or parcels of land heretofore conveyed by grantors to the Jackson, Lansing & Saginaw Railroad Company by deed dated the 18th day of September, 1880. A warranty deed from Gilbert Joslin and wife to Polycarp L. Laprez dated October 9, 1884, and duly recorded, containing the same description, together with precisely the same exception as the previous deed. A warranty deed from Polycarp L. Laprez and wife to Samuel C. Bell, dated February 24, 1894, and duly recorded March 12, 1894, containing precisely the same description and exception as the prior deeds. The next and last conveyance is a warranty deed from Samuel C. Bell and wife to Frank R. Sheldon, the complainant herein, dated May 16, 1904, recorded May 17, 1904, containing the same description and exception as in the prior deeds.

It seems that Gilbert Joslin was the first purchaser to tak:

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possession of this property, which he did in 1881; and it appears that the fence above referred to had then been erected. He built a house thereon and remained in possession for a time. One Wedge, a tenant for Polycarp L. Laprez, seems to have built the barn, which was entirely on the disputed strip. Bell, while in possession, built an addition to the house and added a wagon shed to the barn, called by him a "lean-to." The barn, shed, and a part of the kitchen are on the disputed strip of land.

It appears that Bell went into possession in 1889 under a contract to purchase from Laprez, although, as we have seen, he did not obtain his deed until February, 1894. He lived in the house continuously for 11 years from 1889, after which the property appears to have been leased for some 2 years, when it was purchased upon contract by complainant, who went into possession in 1902, and has lived continuously on the lot up to the time of the hearing in this case, although he did not obtain his deed until 1904. Complainant paid \$700 for the property.

On or about the 8th of November, 1906, the defendant Michigan Central Railroad Company, by its servants, started to tear down the fence on the westerly side of complainant's alleged land, and commenced to dig post holes on what complainant claims was his own premises easterly from the location of said fence, and 50 feet from the center of the track. Upon request of one of complainant's solicitors, the said defendant railroad desisted from moving the fence, and immediately thereafter complainant filed his bill to quiet his title. By his bill he claims that the premises were inclosed by a fence, and that he was at the time of filing the bill in actual possession of said described premises and that part thereof inclosed by the fence, and that he and his grantors had been in actual, open, notorious, visible, hostile, and continuous possession thereof for 15 years and upwards. He represents by his bill that the claim of the defendants is a cloud upon the title of complainant, and tends to depreciate the value of the property. He prays that the court may decree that he has a clear, free, and perfect title to the aforesaid premises, including the land up to said fence as heretofore stated, and that defendants have no title or interest in any part thereof; and he prays for a perpetual injunction restraining defendants from setting up or asserting any claim or interest in said premises as then occupied by complainant, including all the land up to said fence.

The defendants, jointly answering, admit that complainant is in possession of said premises, and that part thereof is inclosed by said fence; but they deny that said complainant and his grantors have been in actual, open, notorious, visible, hostile, and continuous possession thereof for 15 years and upwards. They further admit that they claim to own, and have the right to the possession of, the part of the premises then occupied by complainant.

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and inclosed by said fence, and claim to own the property conveyed to them by the aforesaid conveyance of September, 1880. They deny that complainant has any title to that portion of said premises described in the said deeds, and they assert that complainant has no title to said disputed premises whatever; that is, so much of the fenced portion as is within the lines of defendants' right of way. Defendants also, by way of cross-bill, set up by metes and bounds a description of their said right of way over the premises; assert that they claim to own the same, and that the claims and assertions of the said complainant constitute a cloud upon their title; and they pray that by decree their title may be quieted and the right of possession be adjudged to the defendants.

By a decree bearing date 28th of July, 1909, the circuit judge found that complainant had established by testimony the fact that he and his grantors had had the continuous, hostile, adverse, notorious, and visible possession of the disputed strip of land up to the fence for more than 15 years before bringing suit, and ordered complainant's title to be quieted.

In the printed brief of complainant appears the following statement: "The important question in this case is whether or not the complainant has the right to tack his adverse possession of the strip of land in dispute to that of his predecessors and grantors, Samuel C. Bell and Loretta May Bell, husband and wife. It is not disputed that the adverse possession of said Samuel C. Bell did not continue for the full statutory period of 15 years; but, if the possession of the complainant can be tacked to that of his grantors, this would constitute the full time of 15 years, provided, however, that the exception in the deed from Samuel C. Bell and wife to complainant of this right of way did not break the continuity of the possession and did not stop the running of the statute of limitations."

As we understand the position of defendants, they do not dispute the fact that the actual and continuous possession of the disputed strip of land, as held by the complainant and his grantor, Samuel C. Bell, exceeds the term of 15 years, but they contend: (1) That the acceptance by complainant of the deed, excepting from said lot 16 in block 2 the entire right of way as conveyed to the defendant Jackson, Lansing & Saginaw Railroad Company by Stanislaus Legault and wife, in September, 1880, amounts to a declaration of acquiescence in defendant's title, thereby admitting that his own holding was not adverse. (2) That as the deed to the complainant did not contain a description of the disputed piece, he has no right to tack to his own possession the possession of his grantor Bell, because there was no privity of estate between the parties as to the said described strip.

It is important to bear in mind that in every conveyance of the several grantors of the complainant, after the deed of right of

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way was given to the defendant Jackson, Lansing & Saginaw Railroad Company, there was the following exception: "Except, however, all that part of said above-described piece or parcel of land heretofore conveyed by Stanislaus Legault and wife to the Jackson, Lansing & Saginaw Railroad Company by deed dated the 18th day of September, 1880."

It clearly appears from this record that there is no evidence of any parol permission, or authorization of any kind, given by the grantor Bell to the complainant, to take the place of the said Bell in the wrongful possession which Bell held of the strip of land in controversy in this case. Nor is there any evidence in the record of any parol permission, or authorization of any of the grantors in the deeds hereinbefore referred to, to their grantees, to take the places of their grantors in the wrongful possession of said described strip of land. The record also shows that there was no parol agreement, understanding, permission, or authorization respecting the premises which complainant's grantor had held, or would deliver; and this applies, not only to the strip of land in dispute, but also to that conveyed in the deed. The record shows that complainant took possession. There is not a syllable of any verbal authorization of delivery whatever. He testified as follows: "I took possession of the premises after I bought from Mr. Bell. Q. When? A. Why, just as soon as I bought on contract; just as soon as I got the contract I moved in and took possession of it. I moved in, I think, in 1902, and got the deed of it in 1904. Q. When you bought the premises, did you inquire how far your lot went? A. No, sir."

The complainant contends that under the authority of the case of Illinois Steel Co. v. Budzisz, 106 Wis. 499, 81 N. W. 1027, 82 N. W. 534, 48 L. R. A. 830, 80 Am. St. Rep. 54, he has the right to begin the running of the statute of limitations from the time his grantor, Bell, took possession in 1889, and to tack his possession upon that of Bell's. We doubt the applicability of the case cited to the state of facts existing here.

It is not necessary for us to decide whether any oral agreement to surrender a wrongful possession to the successor, so that where the continuous possession exists 15 years, would defeat an action to recover possession by the owner. Not a scintilla of evidence is shown in this record of any parol transfer of Bell's possessory rights to the strip of land in litigation, and what is true as between Bell and the complainant is equally true as to all prior grantors. There was no transfer of any mere possessory right to the strip of land in litigation here, if any existed. No permission or authorization by Bell to Sheldon to take his place in possession of said litigated strip of land appears. The exception in the deed negatives such transfer, permission, or authorization, and the record contains no other testimony of any such transfer, permission, or authorization. Indeed, it may be

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said that the testimony establishes the very opposite. Bell could not transfer possessory rights of the strip without intending to do so; he could not intend to do so without knowing that he had such possessory rights; and he testified that he did not know whether he occupied any of the railroad company's land, and never thought anything about it. And so complainant could not have acquired Mr. Bell's possessory rights in the strip by parol, or other agreement, bargain, or understanding without having some knowledge of the subject; and his testimony shows that when he bought he had no knowledge that the railroad company owned this strip of land, and consequently he could have had no knowledge of Bell's possessory rights therein.

As we have already said, in buying, complainant did not even inquire as to the extent of the lot he was buying. It being conceded that complainant has not had possession of the disputed strip of land long enough to acquire title thereto by his adverse possession, we are brought to the question whether or not he has the right to tack to his own possession the possession of his grantor, Bell. It seems to be undoubted that separate successive disseisins cannot be tacked so as to constitute one and a single continuous possession, unless there is privity of estate between the successive parties in possession, each coming in as the transferee of the possessory rights of his predecessor.

It seems to us to be very clear that the complainant cannot rely upon his deed to show privity of estate, because the disputed premises are not mentioned in the deed. Where the grantee relies upon the deed to show privity of estate, he cannot have the benefit of the grantor's possession of lands which are not mentioned in the deed. 1 Am. & Eng. Ency. Law (2d Ed.) 845, and cases cited in note 4. The general rule is that possession cannot be tacked to make out title by prescription where the deed under which the last occupant claims title does not include the land in dispute. It must clearly appear in the deed that the particular premises were embraced in the deed, or transfer, in whatever form it may have been made. 1 Cyc. 1007, and note.

It was held in the case of *Humes v. Bernstein*, 72 Ala. 546, that when a vendor conveys by deed lands particularly designated, or described by metes and bounds, the purchaser acquires title, or color of title, only to the lands within the designated numbers and boundaries; and if he claims adverse possession under color of title of the adjoining lands outside of those numbers and boundaries because his vendor was in possession thereof at the time his conveyance was executed, he must show that the possession thereof was delivered to him as a part of the lands sold and conveyed; otherwise he cannot tack his vendor's prior possession to his own subsequent possession for the purpose of making out a title under the statute of limitations.

In *Erck v. Church*, 87 Tenn. 575, 11 S. W. 794, 4 L. R. A. 641,

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where it appeared that the purchaser, by mistake, inclosed land not conveyed in his deed, and held the land thus inclosed as his own for less than the statutory period, and then conveyed to B. by a deed containing the description identical with his own deed, and B. went into possession of the whole and held it as his own long enough to make out the period of limitation by tacking his possession to that of A., it was held that the possession of the land inclosed by mistake could not be tacked.

In *Witt v. St. Paul, etc., R. Co.*, 38 Minn. 122, 35 N. W. 862, where A. entered and occupied the land, which consisted of several lots, and the land was subsequently sold for taxes, and still later the owner of the tax title conveyed his interest in some of the lots to A., who subsequently conveyed to B. by a description which recited, "intending to convey only those lots which had been quitclaimed to said parties of the first part, or either of them, by a conveyance of tax titles," it was held that the possession of B. must be referred to the deed, and that as to those lots not included in the tax deed there was not privity between him and A., he merely succeeding to the possession of the lots; but there was no unity of possession under the original hostile entry by A. To the same effect are the following authorities: *Ablard v. Fitzgerald*, 87 Wis. 516, 58 N. W. 745; *Allis v. Field*, 89 Wis. 327, 62 N. W. 85; *Sheppard v. Wilmott*, 79 Wis. 15, 20, 47 N. W. 1054; *Wood Pulp Co. v. Chandos*, 78 Wis. 526, 47 N. W. 661; *Ryan v. Schwartz*, 94 Wis. 403, 69 N. W. 179; *Graeven v. Dieves*, 68 Wis. 317, 31 N. W. 914; *Fairfield v. Barrette*, 73 Wis. 463, 468, 41 N. W. 624.

The rule is that evidence of adverse possession must be strictly construed, and every presumption is in favor of the true owner, and that the plaintiff entered under his deed, and that his possession is only coextensive with his title, and restricted by the premises described in his deed. *Cooper v. Ord*, 60 Mo. 420; *Smith v. Reich*, 80 Hun, 287, 30 N. Y. Supp. 167. Adverse possession must be continuous, and, when one person seeks to unite his possession to the possession of the prior occupants, the several titles must be connected by purchase or descent. Without some privity between the successive occupants, the several possessions cannot be tacked together so as to make continuity of possession. In that case the court said: "If Mary Cordts had been shown to have occupied the land in dispute, Mrs. Reich could not avail herself of that occupation to make up the 20 years necessary to establish an adverse possession, for the reason that the description in her deed excluded the land, and, consequently, she had not acquired Mrs. Cordts' title. A different case would have been presented had the description in that deed included the land in question."

In *Ward v. Bartholomew*, 6 Pick. (Mass.) 410, it was held that disseisins do not aid one another in creating a title by possession.

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Thus, where the disseisor conveys part of the land, and the grantee, under color of the deed, enter upon the whole, the possession of the first disseisor will not avail the grantee in regard to the part not embraced in the deed. *Fell & Thorp Co. v. Penna. R. Co.* (N. J.) 20 Atl. 63.

In *Maher v. Brown and Ely et al. v. Same* (heard together) 183 Ill. 575, 56 N. E. 181, E., being the owner of lot 15, his homestead, inclosed therewith a strip of 14 feet, and afterwards conveyed to his wife lot 15, and continued to live there with her. It was held that, he thereafter having no actual possession of the strip, any subsequent possession of his could not be joined to his prior possession to give title by adverse possession to the strip, and, there being no privity of estate between him and her, any possession of hers could not be tacked to his prior possession, to give title to either by adverse possession.

Messer v. Hibernia Savings & Loan Society, 149 Cal. 122, 84 Pac. 835. This case holds that a claimant of land by adverse possession cannot tack to the time of his possession that of a previous holder, where the land in dispute is not included in the boundaries in the deed from such holder, and cites *Vicksburg R. Co. v. Le Rosen*, 52 La. Ann. 192, 26 South. 854.

Many more authorities might be cited in support of this doctrine. It has been supposed that the case of *Davock v. Nealon*, 58 N. J. Law, 21, 32 Atl. 675, is in conflict with the doctrine hereinbefore set forth; but an examination of the case will show that it is easily distinguished. That is a case where one holding a legal paper title to a piece of land, in inclosing it, includes within the inclosure a piece of adjoining land, and enters into the possession of the entire inclosed tract, and then transfers his paper title to another, who goes into possession of the entire inclosed tract; and it is held in such a case that the grantee may tack his possession.

There is no claim here that this complainant, holding a legal paper title to his lot, inclosed within his inclosure a piece of adjoining land and entered into possession of it. The inclosure or fence in the case we are considering was built by the defendant the Jackson, Lansing & Saginaw Railroad Company. This defendant had a right to inclose so much of its land as it saw fit. The fact that it only embraced 50 or 60 feet within its inclosure, when it might have embraced 100 feet, is no evidence of an abandonment of that portion not fenced. "The boundary line must have been, first, a disputed boundary; secondly, the fence must have been built pursuant to a mutual agreement between the adjoining proprietors to settle such disputed boundary. Unless these elements appear, the doctrine of boundaries cannot apply." When this fence was built, there was no dispute as to the boundary line between the railroad company's right of way and

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the adjoining proprietor. Neither has there been any dispute of such true boundary line at any time. Had this fence been built approximately near the line, there would have been some plausibility in the position that it was intended as a line fence; but a difference of 30 or 40 feet shows that the defendants never could have intended it as a line fence. We do not think it can be said that there has been acquiescence in a boundary line here. Nor can it be said that the fence in question has been located by the parties as the line boundary. As we have already said, the defendant Jackson, Lansing & Saginaw Railroad Company never intended this fence for a line. It inclosed a part of its premises. Hence *Case v. Trapp*, 49 Mich. 59, 12 N. W. 908, and *Bird v. Stark*, 66 Mich. 654, 33 N. W. 754, are not applicable. The fence was neither located by the authority of the village, nor treated by the parties as a division fence within the holdings of *Wilmarth v. Woodcock*, 66 Mich. 331, 33 N. W. 400, and *Beaubien v. Kellogg*, 69 Mich. 333, 37 N. W. 691, cited by complainant. The rule applicable to boundary lines is well defined in the following cases: *Cronin v. Gore*, 38 Mich. 381; *De Long v. Baldwin*, 111 Mich. 469, 69 N. W. 831; *Olin v. Henderson*, 120 Mich. 150, 79 N. W. 178; *Turner v. Angus*, 145 Mich. 681, 108 N. W. 1100.

But it is further contended by complainant that the doctrine of equitable estoppel should be applied to this case. There is no evidence in this record that the defendants, or either of them, have been guilty of fraud, or have held out any inducement to the complainant, or his grantors, to enter into possession of their property. Even if silence and acquiescence can sometimes estop a party from asserting a claim to real estate, there is no evidence in this case that warrants the application of the rule. The defendants have occupied the railroad track, the deed to complainant asserted their boundary, and the mere fact that they have not fenced in all their holdings does not give complainant a superior equity, in view of the fact that he was bound to look at the description in his deed. Had the deeds to complainant and his grantors contained the disputed strip of land, a different question might arise. One certainly cannot be estopped from asserting a title against a party who has always known of and always recognized it, as complainant did in accepting his deed. *First Nat. Bank of Kalamazoo v. McAllister*, 46 Mich. 397, 9 N. W. 446. Here the evidence of title was of record. *Shaw v. Chambers*, 48 Mich. 355, 12 N. W. 486. The defendants have not been guilty of any fraud in language or conduct which would give the complainant a superior equity. This is not a case where the defendants have stood by and knowingly allowed their land to be sold, without disputing the validity of the sale, for the reason that the sale did not embrace their land. The bill bases

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the claim of the complainant upon an adverse possession. Hence no claim of an equitable estoppel can be asserted. It was held as early as the case of *Moran v. Palmer*, 13 Mich. 368, that estoppels, where they formed the foundation of the relief asked, and are relied upon to defeat a legal title, cannot be proved unless alleged. And the earlier case of *Cicotte v. Gagnier*, 2 Mich. 381, is cited in support of the proposition. It will be noted in this case complainant makes no claim of an estoppel. So, in any view of the case, it seems to us that the complainant had the mere naked possession of the land in dispute, without title, or color of title, and the defendants, having the absolute title thereto, might lawfully make peaceable entry thereon and remove the fence, or do any other lawful act. It appears to us that the claim of complainant cannot be maintained; and that he, not having been in adverse possession, for the statutory period, must be held to be a mere trespasser upon this disputed strip of land.

The defendants ask for affirmative relief, and that their right and title to the disputed strip be quieted. There is no evidence in this record of the value of the improvements which have been placed upon this disputed strip by the complainant and his grantors. Nor is there any evidence as to how much, if at all, the premises have been enhanced in value by reason of the buildings erected thereon. It seems to us, however, that the complainant and his grantors having been allowed to place these buildings on this disputed strip, probably in the mistaken belief that they owned the same, they should have the right to remove them within a reasonable time. The entire controversy should be settled in this suit. The complainant has not been in possession for six years. Neither can it be said that he has been in possession for less than six years under color of title. We are of the opinion, however, that he should have the right to remove the buildings from the disputed territory within six months, and upon that condition we will grant the relief prayed for by the defendants in their cross-bill.

The complainant's bill of complaint should be dismissed, and the defendant's title to the premises should be quieted upon the condition already indicated, and the decree of the lower court should be reversed, with costs of both courts.

OSTRANDER, HOOKER, MCALVAY, BROOKE, and BLAIR, JJ., concurred with STONE, J.

CASE *v.* CHICAGO GREAT WESTERN RY. CO.

(Supreme Court of Iowa, June 16, 1910.)

[126 N. W. Rep. 1037.]

Railroads—Crossing Accident—Contributory Negligence—Stopping Teams.*—One is not required, as matter of law, to stop his

*For the authorities in this series on the question whether it is the duty of a pedestrian or driver to stop before attempting to cross steam railroad or street railway tracks, for the purpose of looking and listening for approaching trains or street cars, see *Cottle v. New York, etc., Ry. Co. (Conn.)*, 34 R. R. R. 282, 57 Am. & Eng. R. Cas., N. S., 282 (failure of driver to stop to look and listen for trains until within a few feet of track, when it was too late to avoid accident, was negligence); *Barthelmas v. Lake Shore & M. S. Ry. Co. (Pa.)*, 34 Am. & Eng. R. Cas., N. S., 378, 57 Am. & Eng. R. Cas., N. S., 378 (must stop, look, and listen, whether or not there is a suitable place for performance of such duties; and failure to do so is negligence per se); *Louisiana & A. Ry. Co. v. Ratcliffe (Ark.)*, 33 R. R. R. 255, 56 Am. & Eng. R. Cas., N. S., 255 (one traveling in a vehicle need only look and listen for trains at a railroad crossing, and is not bound to stop unless he cannot look and listen without stopping); *Bistider v. Lehigh Valley R. Co. (Pa.)*, 33 R. R. R. 492, 56 Am. & Eng. R. Cas., N. S., 492 (where deceased was familiar with a railroad crossing, stopped his vehicle at a point where he could not see the track on account of standing cars, and failed to go for such purpose at a point where he could have seen an approaching train, and was killed in crossing, there could be no recovery for his death); *New York Cent., etc., R. Co. v. Maidment (C. C. A.)*, 32 R. R. R. 681, 55 Am. & Eng. R. Cas., N. S., 681 (law exacts from driver of automobile a strict performance of the duty to stop, look, and listen before driving upon railroad crossings); *Cable v. Spokane, etc., R. Co. (Wash.)*, 31 R. R. R. 206, 54 Am. & Eng. R. Cas., N. S., 206 (person about to cross the track of a steam railway, or an interurban electric railway, must, as a general rule, stop, look, and listen); *Birmingham Ry., etc., Co. v. Clark (Ala.)*, 21 R. R. R. 618, 44 Am. & Eng. R. Cas., N. S., 618 (failure to stop will preclude recovery); *Potter v. Pennsylvania R. Co. (Pa.)*, 30 R. R. R. 443, 53 Am. & Eng. R. Cas., N. S., 443 (driving horse close to railroad track before stopping to look and listen, where horse became frightened at train, and crossed track in front of it and was killed); *Keller v. Erie R. Co. (N. Y.)*, 22 R. R. R. 599, 45 Am. & Eng. R. Cas., N. S., 599 (duty to highway traveler to stop until smoke had ceased to obstruct view); *Wade v. Western Maryland R. Co. (Pa.)*, 30 R. R. R. 238, 53 Am. & Eng. R. Cas., N. S., 238 (duty of person who borrowed the horse to stop, look, and listen before crossing track, although person who borrowed the wagon was driving); *Mankewicz v. Lehigh Valley R. Co. (Pa.)*, 25 R. R. R. 509, 48 Am. & Eng. R. Cas., N. S., 509 (duty of traveler to alight from vehicle and walk to place where he can get good view up and down railroad track); *Kujawa v. Chicago, etc., Ry. Co. (Wis.)*, 30 R. R. R. 195, 53 Am. & Eng. R. Cas., N. S., 195 (question for jury whether driver of team should have stopped before reaching crossing); *Gorton v. Harmon (Mich.)*, 30 R. R. R. 204, 53 Am. & Eng. R. Cas., N. S., 204 (traveler by daylight is not required to stop where view of trains is not obstructed); *Southern Ry. Co. v. Aldridge (Va.)*,

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team before attempting to cross a railroad track; whether in a given case he should do so is a question of fact.

7 R. R. R. 59, 30 Am. & Eng. R. Cas., N. S., 59 (absence of watchman and failure to stop, look, and listen); *Hatcher v. McDermot* (Md.), 20 R. R. R. 533, 43 Am. & Eng. R. Cas., N. S., 533 (contributory negligence of driver of team, in not stopping again before driving on track, prevented recovery); *Kinter v. Pennsylvania R. Co.* (Pa.), 8 R. R. R. 61, 31 Am. & Eng. R. Cas., N. S., 61 (contributory negligence in not descending from wagon where view was obstructed); *Cromley v. Pennsylvania R. Co.* (Pa.), 12 R. R. R. 666, 35 Am. & Eng. R. Cas., N. S., 666 (duty to stop again); *Haas v. Chester St. Ry. Co.* (Pa.), 2 R. R. R. 810, 25 Am. & Eng. R. Cas., N. S., 810 (duty to stop before driving upon street car track); *Peck v. Oregon Short Line R. Co.* (duty to stop again where view had been obstructed); *Union Pac. R. Co. v. Buzicka* (Neb.), 5 R. R. R. 64, 28 Am. & Eng. R. Cas., N. S., 64 (in absence of visible or audible evidence of danger, a traveler is not required to stop); *Green v. Los Angeles Terminal Ry. Co.* (Cal.), 7 R. R. R. 117, 30 Am. & Eng. R. Cas., N. S., 117 (failure to stop and look again); *Chicago City Ry. Co. v. Barker* (Ill.), 14 R. R. R. 190, 37 Am. & Eng. R. Cas., N. S., 190 (failure to stop and look not negligence per se); *Haas v. Chester St. Ry. Co.* (Pa.), 2 R. R. R. 810, 25 Am. & Eng. R. Cas., N. S., 810 (failure to stop as showing negligence as matter of law); *Cleveland, etc., Ry. Co. v. Heine* (Ind.), 1 R. R. R. 948, 24 Am. & Eng. R. Cas., N. S., 948 (failure to stop, look, and listen after passing train obstructing view); *Willfong v. Omaha & St. L. R. Co.* (Iowa), 2 R. R. R. 792, 25 Am. & Eng. R. Cas., N. S., 792 (failure to stop, look, and listen is not negligence as matter of law); *Louisville & N. R. Co. v. Price's Adm'r* (Ky.), 10 R. R. R. 769, 33 Am. & Eng. R. Cas., N. S., 769 (not required to stop by Kentucky rule); *Ihrig v. Erie R. Co.* (Pa.), 15 R. R. R. 159, 38 Am. & Eng. R. Cas., N. S., 159 (Pennsylvania rule); *Louisville & N. R. Co. v. Crominarity* (Miss.), 18 R. R. R. 513, 41 Am. & Eng. R. Cas., N. S., 513 (plaintiff was not guilty of contributory negligence as matter of law, in failing to alight from his buggy, and go to a point sufficiently near track to enable him to see beyond the point where his vision was obstructed by cars); *Shatto v. Erie R. Co.* (C. C. A.), 7 R. R. R. 127, 30 Am. & Eng. R. Cas., N. S., 127 (plaintiff's failure to stop before driving on track where view was obstructed was contributory negligence per se); *Campbell v. St. Louis & Suburban Ry. Co.* (Mo.), 9 R. R. R. 248, 32 Am. & Eng. R. Cas., N. S., 248 (question for jury whether boy should have stopped vehicle in order to look and listen before crossing street car tracks, on a dark night); notes, 12 Am. & Eng. R. Cas., N. S., 444, et seq.; *Gahagan v. Boston & M. R. R.* (N. H.), 23 Am. & Eng. R. Cas., N. S., 141; *Bond v. Lake Shore & M. S. Ry. Co.* (Mich.), 12 Am. & Eng. R. Cas., N. S., 447; *Coppuck v. Philadelphia, etc., R. Co.* (Pa.), 15 Am. & Eng. R. Cas., N. S., 68; *Darwood v. Union Traction Co.* (Pa.), 12 Am. & Eng. R. Cas., N. S., 475; *Smith v. Boston & M. R. R.* (N. H.), 19 Am. & Eng. R. Cas., N. S., 320; *Ritzman v. Philadelphia & R. R. R. Co.* (Pa.), 12 Am. & Eng. R. Cas., N. S., 444; *Illinois Cent. R. Co. v. Jones* (C. C. A.), 15 Am. & Eng. R. Cas., N. S., 16; *Lewis v. Long Island R. Co.* (N. Y.), 18 Am. & Eng. R. Cas., N. S., 1; *Judson v. Central Vermont R. Co.* (N. Y.), 15 Am. & Eng. R. Cas., N. S., 7 (pedestrian not required to stop before crossing); *Traver v. Spokane St. Ry. Co.* (Wash.), 22 Am. & Eng. R. Cas., N. S., 759 (stop, look, and listen rule is not applicable to street railway).

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Railroads—Crossing Accident—Duty to Look.†—While one about to cross a railroad must look both ways and listen before starting across, he is not bound, as matter of law, to do so at any given point; but whether he did so at a proper point, he testifying where he did so, is generally a question for the jury.

Railroads—Crossing Accident—Assumption as to Management of Train.‡—One about to cross a railroad may assume that trains will be run at lawful speed, and that the usual and customary warnings will be given.

Railroads—Crossing Accident—Contributory Negligence—Evidence.—Evidence in an action for collision of a train with a team at a crossing held sufficient, in view of the evidence as to the illegally high speed of the train and the absence of signals, to go to the jury on the question of the driver having looked and listened for a train at the proper point.

Railroads—Crossing Accident—Looking for and Seeing Train—Questions for the Jury.—It is not a legal proposition, which defendant in a railroad crossing accident case is entitled to have charged, that if plaintiff could have seen the train at the time and place he testified to having looked and listened therefor he must be held to have seen it, or to have not looked and listened; but whether or not he looked and listened, and whether or not he saw or should have seen it, are questions of fact.

Trial—Instructions—Singling Out Evidence—Argumentativeness.—A requested instruction that if plaintiff could have seen the train at the time and place he testified to having looked therefor, he must be held to have seen it, or to have not looked, is objectionable as singling out certain evidence bearing on the case, without regard to the other evidence, and as being purely argumentative.

Trial—Instructions—Applicability to Evidence.—A requested in-

†See second foot-note of *Denver City Tramway Co. v. Cobb* (C. C. A.), 31 R. R. R. 188, 54 Am. & Eng. R. Cas., N. S., 188, where all the authorities on the subject in this series, preceding it, are collected; first foot-note of *Bruggeman v. Illinois Cent. R. Co.* (Iowa), 35 R. R. R. 241, 58 Am. & Eng. R. Cas., N. S., 241; second paragraph of first foot-note of *Campbell v. Chicago Great Western Ry. Co.* (Minn.), 35 R. R. R. 98, 58 Am. & Eng. R. Cas., N. S., 98; seventh head-note of *Wilkinson v. Oregon Short Line R. Co.* (Utah), 34 R. R. R. 360, 57 Am. & Eng. R. Cas., N. S., 360; fourth head-note of *Lundergan v. New York, etc., R. Co.* (Mass.), 34 R. R. R. 344, 57 Am. & Eng. R. Cas., N. S., 344; *Bistider v. Lehigh Valley R. Co.* (Pa.), 33 R. R. R. 492, 56 Am. & Eng. R. Cas., N. S., 492.

‡For the authorities in this series on the subject of the right of a person about to cross railroad tracks to assume that those in charge of trains or cars will perform the duties owing to him, see second foot-note of *Wilkinson v. Oregon Short Line R. Co.* (Utah), 34 R. R. R. 360, 57 Am. & Eng. R. Cas., N. S., 360; first head-note of *Baldie v. Tacoma Ry. & P. Co.* (Wash.), 34 R. R. R. 350, 57 Am. & Eng. R. Cas., N. S., 350; first head-note of *Atchison, etc., Ry. Co. v. Schriver* (Kan.), 33 R. R. R. 267, 56 Am. & Eng. R. Cas., N. S., 267.

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struction that if plaintiff could have seen the train at the time and place he testified to having looked therefor, he must be held to have seen it or to have not looked, is objectionable in stating that he looked at a point 17 feet from the track, when this was a matter of dispute, some witnesses stating it was 20 feet from the track.

Trial—Refusing Instructions Covered by Charge.—Refusing requested instructions covered by the court's charge is not error.

Railroads—Crossing Accident—Instructions—"Plain Sight."—The words "plain sight" in an instruction in a railroad crossing accident case, that it was plaintiff's duty when he arrived at a point from which a train could be seen to take reasonable precautions, by looking in the direction from which a train might come, to ascertain if a train, which might endanger him, was coming, and if the train which injured him was in plain sight from the point where it was his duty to look, and the circumstances suggested a reasonable probability of danger, an attempt to cross was negligence, mean nothing more than that the train was within the range of plaintiff's sight, had he been looking in that direction, and so are unobjectionable.

Appeal from District Court, Black Hawk County; Chas. E. Ransier, Judge.

Action at law to recover damages for injuries received by plaintiff due to his wagon being struck by one of defendant's trains at a street crossing in the city of Waterloo. Trial to a jury, verdict and judgment for plaintiff, and defendant appeals. Affirmed.

Carr, Carr & Evans and *J. E. Williams*, for appellant.
C. W. Mullan and *B. F. Swisher*, for appellee.

DEEMER, C. J. While driving a covered milk wagon along what is known as Franklin street in the city of Waterloo, plaintiff was struck by one of defendant's trains at the crossing of said street, and received the injuries of which he complains. There was no flagman at the crossing and plaintiff claims that the bell on the engine was not rung or the whistle sounded or any other warning given of the approach of the train. He further claims that the train was running at a high and dangerous rate of speed, to wit, from 15 to 20 miles an hour, which speed was unlawful under the ordinances of the city, which fixed the rate within the city at 8 miles per hour; that he both looked and listened for the approach of the train and did not see or hear it, and that notwithstanding due care on his part he was struck and injured. There was a conflict in the testimony upon many of the material points, but the jury returned the following answers to special interrogatories submitted, which answers in view of the conflict in the testimony must be regarded as conclusive. These answers were as follows: "(1) Was the engine

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bell ringing as the train approached Franklin street? Answer: No. (2) Was the whistle sounded for the station? Ans.: Yes. (3) Was the whistle sounded for the street crossing between the viaduct over the Illinois Central Railway and Barclay street? Ans.: Yes. (4) At what rate of speed was the train moving at the Walnut street crossing? Ans.: 15 to 20 miles." That these answers show negligence upon the part of the defendant is practically conceded; but it is strenuously argued in many different ways that under the undisputed testimony as applied to familiar rules of law plaintiff was guilty of contributory negligence, and that there should have been a verdict for the defendant. This contention calls for a brief recital of the testimony from plaintiff's standpoint.

Franklin street is one of the important streets of the city. It is near the business portion, is paved, and crosses defendant's tracks between Sixth and Seventh streets. Franklin street runs east and west, and defendant's track runs a little east of north from its junction with Franklin street. Upon the block immediately north of Franklin street and west of Seventh, there is a lumber shed and office, a lumber yard and coal shed and three dwellings, all obstructing the view of a train coming from the north on defendant's tracks. It is impossible, as we understand it, to see a train coming from the north in passing from the east side of Seventh street until one gets within from 15 to 20 feet of the east rail of defendant's main line of track; but it is conceded that at a point 17 feet from this east rail it is possible to see a train coming from the north a distance of 477 feet. Just prior to receiving his injuries plaintiff was driving westerly along Franklin street toward the railway tracks, his team moving at a rapid walk. When he approached the fill upon which the track was laid, which is shown to be between four and five feet above the grade of the street at the crossing, he slowed his team down, and it was walking slowly as he approached the crossing. As he came to the place where he had an obstructed view of the track he, according to his testimony, which has some corroboration, pulled his team to a stop or practically to a standstill, looked northeasterly and along the track and as far as he could see, and listened for the approach of a train. Seeing or hearing nothing he looked down the track in a southwesterly direction for trains which might be coming from the south. None being in sight or hearing in that direction, he proceeded to cross the track, and just as his horses had gotten over the tracks and while his wagon was upon them he heard a train coming from the north, cast his eyes in that direction, and discovered the rapidly moving train within 150 feet of him. He then attempted to back his team off the track, but was unable to do so, and the team and wagon were both struck by the train, one horse killed, the wagon badly broken, and plaintiff thrown out, struck by the locomotive,

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and badly injured. The Walnut street crossing referred to by the jury was 300 feet north of the one at Franklin street. Two boys were riding on the wagon which plaintiff was driving, one upon the right or north side, and the other upon the left or south side as it approached the crossing. These boys were standing upon steps near the middle of the wagon, and the boy on the right side of the wagon testified that as plaintiff approached the railway crossing he stopped the team; that he (the boy) heard no locomotive whistle and that no bell was rung, and that he did not see the train until just before it struck the wagon, when he jumped and escaped injury. Defendants say, however, there is no testimony that plaintiff slackened the speed of or stopped his team before reaching the crossing; no testimony that he looked to the northward for the approach of a train, or, rather, that although plaintiff testified that he did look and saw no train, his testimony should be disregarded, for that if he did look at the point he said he did he could not help seeing the train, and for these reasons that plaintiff was guilty of contributory negligence as a matter of law and should not recover. In the first place it is not true, as a matter of law, that one must stop his team before crossing a railway track. Whether or not he should do so in any given case is a question of fact for the jury and not of law for the court. *Selensky v. R. R. Co.*, 120 Iowa, 113, 94 N. W. 272; *Lorenz v. R. R.*, 115 Iowa, 377, 88 N. W. 835, 56 L. R. A. 752; *Willfong v. R. R.*, 116 Iowa, 548, 90 N. W. 358, and cases cited. But it is said that under the testimony plaintiff either did not look for the approaching train, or if he looked he must have seen it in time to have avoided the injury, and in either event he was guilty of contributory negligence. Generally speaking the question of contributory negligence in such cases is for the jury. *Cummings v. R. R.*, 114 Iowa, 85, 86 N. W. 40; *Schulte v. R. R.*, 114 Iowa, 89, 86 N. W. 63; *Meyer v. R. R.*, 134 Iowa, 722, 112 N. W. 194, and cases cited. Of course one may not heedlessly drive upon railway tracks at street crossings without looking or listening for approaching trains and hold the railway company liable, no matter how negligent it may have been. One about to cross a railway track must take reasonable precautions for his own safety. He must sometimes stop his team and look and listen, and in any event must both look and listen before subjecting himself to the dangers from passing trains. *Payne v. R. R.*, 108 Iowa, 188, 78 N. W. 813; *Moore v. R. R.*, 102 Iowa, 596, 71 N. W. 569; *Cummings v. R. R.*, supra; *Starry v. R. R.*, 51 Iowa, 419, 1 N. W. 605. But one about to cross a railway track has the right to assume that trains will not be run at an unlawful rate of speed; that the usual and customary warnings will be given; and that the railway company will comply with its duty in approaching street crossings. Cor-

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rell v. R. R., 38 Iowa, 120, 18 Am. Rep. 22; Cummings v. R. R., supra; Moore v. R. R., supra.

One about to cross a railway track is not bound, as a matter of law, to look or listen for a train at any given point. Whether or not he looked and listened at a point where he might have seen the train and avoided the injury in the use of ordinary care and prudence is generally a question for the jury, and the instant case was submitted to the jury on that theory. Without absolutely disregarding the testimony, we must say that the jury was justified in finding that plaintiff either slacked the speed of his horses or stopped them; that a point 17 feet from the track he looked in a northerly direction for an approaching train, saw none, although he had an unobstructed view of the track for something like 477 feet, that he then looked to the southward, as was his duty, for trains coming from that direction, his team in the meantime walking slowly toward the track, and that neither he (plaintiff) nor the boy who was on the right side of the wagon riding with him heard or saw the approaching train until it was within 150 feet of them. A jury was justified in finding that the train which struck plaintiff was running at from 15 to 20 miles per hour; that it passed over at least 327 feet while plaintiff's team covered the 17 feet between the place where plaintiff says he stopped and the east rail of the track, and the distance from the east rail to the other side of the track. It took some time for plaintiff to look to the south and assure himself there was no danger from that direction. So it is apparent that because of the high rate of the speed of the train plaintiff was placed in a position of peril which would not have existed had the train been run at eight miles per hour or had the usual signals been given of the approach of the train. Appellant's counsel have made what they call a mathematical demonstration of plaintiff's contributory negligence. Such figures are not always reliable because witnesses cannot state with accuracy distances, rates of speed, etc. Aside from this, however, the figures furnished by appellant's counsel are based upon testimony which is the subject of dispute. Moreover, appellant's counsel in making their figures do not allow anything for the time required of plaintiff in looking for a train from the south, nor do they give any regard to the fact that plaintiff's team was upon or just over the track when plaintiff saw the engine. Taking these facts into account it is manifest that the train was not in sight if running at the rate of 20 miles per hour when plaintiff looked toward the north. The question of contributory negligence was manifestly for the jury.

2. Appellant asked an instruction reading as follows: "If you find that the defendant's train was at any place within 477 feet of the place on Franklin street which is marked 'A' on the plat in evidence, and which is 17 feet from the southeasterly rail

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of the main track, at the time plaintiff testifies he looked in a northeasterly direction to see if a train was approaching, then you should disregard his testimony that he looked for an approaching train at the time and place he testifies he slowed down his team and looked and listened to ascertain if a train was approaching." Such a thought may well be made in argument to a jury, but it will hardly do to announce as a rule of law that if one could have seen a train at a given time and place he must be held to have seen it, or that he did not look and listen for it. This may, under some circumstances and perhaps under most, be regarded as a logical proposition but it is not a legal one. Whether or not a person did look and listen, and whether or not he saw or should have seen an approaching train are questions of fact for a jury and not of law for the court. Neither of the cases cited and relied upon by appellant announces any such rule of law as is set forth in the requested instruction. Moreover it singles out certain testimony bearing upon plaintiff's case without regard to the other evidence in the case, and is purely argumentative in character. It was for the jury to say whether or not plaintiff looked for the train, at what place he looked, and whether or not he saw it before he was struck. Again, even if plaintiff saw the train 477 feet away, and it had been running at a proper rate of speed, he (plaintiff) might safely have crossed ahead of it, and his act in attempting to do so would not necessarily constitute contributory negligence. Another reason for not giving the instruction is that it stated that plaintiff looked at a point 17 feet from the east rail of the track. This was a matter in dispute. Some of the witnesses testified it was 20 feet from the rail where plaintiff looked. Of the other instructions asked by defendant, those which announced correct rules of law were given by the court in its charge, and there was no error in refusing them.

3. A part of the eighth instruction given by the trial court reads as follows: "It was the duty of the plaintiff to take reasonable precautions to ascertain if a train was coming which might endanger him at the crossing, and to make reasonable use of his senses by listening for signals or the noise of the train when within a reasonable distance from the crossing, and when he arrived at a point from which a train could be seen, by looking in the direction which a train might come; and, if the train in question was at the time in plain sight or hearing from the point where it was the plaintiff's duty to so look or to so listen for trains, and so circumstanced as to suggest reasonable probability of danger, an attempt to cross the track would be negligence which would defeat his recovery of damages for injury thus received."

The use of the words "plain sight" are criticised. They have been used many times in the opinions of this court in referring

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to the same subject as in *McLeod v. R. R. Co.*, 125 Iowa, 273, 101 N. W. 77, and in our opinion are not objectionable. "Plain sight" means nothing more than that the train was within the range of plaintiff's vision, had he been looking in that direction. If the train was obstructed or could not readily be seen, then it was a question as to whether or not plaintiff was bound to see it. If in plain sight, then, under the instruction, plaintiff was bound to see it and to govern himself accordingly. In order to show with what care the case was submitted we here quote the next paragraph of the instruction complained of: "If obstructions to his view when approaching the track, or if interference with his hearing while his team was in motion, or other circumstances, indicated that it was essential for him to stop his team and wagon in order to overcome the noises within his control, and to the better see and hear whether it was safe for him to cross, it was his duty to stop, and if the neglect on his part to perform any of such duties to stop, look, or listen, as so required of him, contributed to cause the accident, it would preclude any recovery by the plaintiff even if you should find that the defendant was also negligent, or failed to give signals, maintain a flagman, or was running at an excessive or unlawful speed."

The case was fairly submitted to the jury, and the verdict has support in the testimony, and as we discover no prejudicial error the judgment must be, and it is, affirmed.

CLARKE v. CONNECTICUT CO.

(Supreme Court of Errors of Connecticut, June 14, 1910.)

[76 Atl. Rep. 523.]

Negligence — Freedom from Contributory Negligence — Proof. — Plaintiff in an action for negligence, in general must show that his injuries were not caused by his own want of reasonable care.

Negligence—Contributory Negligence—Question for Jury.—In an action for injuries, whether plaintiff's failure to exercise reasonable care contributed essentially to his injury, are questions for the jury on consideration of all the circumstances of the case.

Street Railroads—Collision with Vehicle—Passenger in Vehicle—Care Required.*—While a gratuitous passenger in an automobile is not expected ordinarily to give advice or direction as to its control or management, and under all circumstances is not bound to use his senses or to look or listen in order to discover approaching street cars or other dangers, he is nevertheless subject to the same stand-

*See last foot-note of *Ingalls v. Lexington & B. St. Ry. Co.* (Mass.), 35 R. R. R. 297, 58 Am. & Eng. R. Cas., N. S., 297.

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ard of duty as the driver, to wit, the use of reasonable care for his own safety.

Street Railroads—Collision with Vehicle—Passenger of Vehicle—Care Required.*—While the standard of duty required of a gratuitous passenger in an automobile is the same as the driver, to wit, the exercise of reasonable care, the conduct required to fulfill that duty is ordinarily different; whether the passenger has exercised reasonable care under all the circumstances being a question for the jury.

Street Railroads—Injuries to Travelers—Automobiles—Gratuitous Passenger—Care Required—Instructions.—Where plaintiff, while riding as a gratuitous passenger with her husband in an automobile, was injured in a collision with a street car, an instruction that she would be chargeable with contributory negligence only in case she saw or knew of the actual danger of collision in time to warn her husband to stop the automobile, and neglected to warn him, was erroneous, as making her freedom from contributory negligence depend on circumstances other than the exercise of reasonable care under all the circumstances.

Street Railroads—Injuries to Travelers—Contributory Negligence—Questions for Jury.—In an action for injuries to plaintiff while riding in an automobile with her husband in a collision with a street car, whether plaintiff was free from contributory negligence held for the jury.

Street Railroads—Injuries to Travelers—Contributory Negligence—Instructions.—In an action for injuries to plaintiff in a collision with a street car, a request to charge on plaintiff's alleged contributory negligence, that her failure to use due care to see or hear the car coming, precluded recovery, without reference to whether such negligence was the proximate cause of the injury, was properly refused.

Trial—Request to Charge—Instructions Given.—Where a husband and wife both sued for injuries in an automobile collision with defendant's street car, an instruction that the collision in question was caused by defendant's negligence, covered defendant's request to charge that they could not recover if the husband's negligence was the sole cause of the collision.

Street Railroads—Collision with Vehicle—Contributory Negligence—Gratuitous Passenger of Vehicle.—Where plaintiff, while riding in an automobile driven by her husband, was injured in a collision with a street car, the fact that she knew of the manner in which her husband operated the automobile, even if he was negligent, did not necessarily convict her of negligence in remaining in the automobile though she acquiesced in his manner of driving, unless she knew that his manner of operation was negligent, or it was so gross and apparent that she was bound to know it.

See (*) on preceding page.

Clarke v. Connecticut Co

Appeal from Superior Court, New Haven County; Edwin B. Gager, Judge.

Action by Edith L. Clarke against the Connecticut Company. Judgment for plaintiff, and defendant appeals. Reversed, and new trial ordered.

Thomas M. Steele and Hamson T. Sheldon, for appellant.

Robert C. Stoddard and Charles F. Clarke, for appellee.

THAYER, J. The plaintiff was riding with her husband in a small, light, open automobile having only two seats, and known as a runabout, which was then driven by and entirely under the control and management of her husband. They turned from the south out of First avenue, West Haven, into Elm street, making a wide curve, and came partly upon the east-bound track of the defendant's double track electric railway, which extends through the center of that street, the automobile heading and proceeding east. Almost immediately an east-bound car of the defendant struck the automobile, and as a result of the collision the plaintiff received the injuries for which she seeks to recover in this action.

The husband also brought an action for injuries to the automobile. The two actions were tried together by agreement to a jury, and in the husband's action the defendant had a verdict. As the jury upon the same evidence gave this plaintiff a verdict, it is apparent that they found the defendant guilty of the negligence charged against it and that the husband's freedom from contributory negligence was not established. Whether they found him guilty of such negligence cannot be known. The only question of any substance raised by the appeal is whether the court's instruction to the jury was correct with respect to the question of contributory negligence as related to the plaintiff's action.

The plaintiff and her husband were familiar with the general situation at the junction of the streets where the collision occurred, having driven over it three or four times during the three or four weeks that her husband had owned the automobile. The chief questions of fact concerning which the parties were in controversy were as to the point at which the occupants of the automobile could have seen the car approaching from the west as they drove north through First avenue to the place of collision, whether either of them looked for a car before passing upon the track, the speed of the vehicles as they approached each other, and whether they were properly managed. There was ample room for the passage of the automobile through the street south of the railway track and no vehicles or other obstructions in the way, although there was a slight gully in the macadam at the southeast corner of the streets, to avoid which the wide turn was taken. The defendant claimed that the plaintiff was guilty

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of contributory negligence in failing to make a reasonable use of her senses to discover the danger and in failing to make proper efforts, by calling it to her husband's attention or otherwise, to avoid it. It requested the court to charge the jury that if they should "find that Mrs. Clarke by using reasonable care might have seen or heard the car coming in time to warn her husband so as to allow him to stop the automobile, or to check its speed or to avoid going upon the track or to leave the track or in any other way to avoid the collision and that she failed to use such care, she could not recover." The court charged the jury that if the automobile was being operated in a dangerous manner and Mrs. Clarke knew of the dangerous situation in time to have warned her husband so that the accident could have been prevented, and did not so warn him, and without objection acquiesced in his manner of operation, she was negligent and could not recover. It further charged as follows: "But as to whether she saw or could have seen or not you will bear in mind that she was not operating the machine either by herself or by her agent, and she was under no special obligation to look out for danger. That situation had been assumed and was occupied by her husband. So it gets down to a question of fact did she, under the circumstances there in question, see the danger in time to warn and stop and did not warn and stop; and that I think, so far as the facts are disclosed in this case, is the only situation which will prevent her recovery if you find the other element of the defendant's negligence exists." By the rule thus laid down no duty rested upon the plaintiff to look out for or to guard against the probable or possible danger which would arise from driving upon the track. She would, under the instructions, be chargeable with contributory negligence only in case she saw or knew of the actual danger in time to warn her husband so that he might stop the automobile and neglected to warn him. The charge would excuse her from negligence although she saw and knew of the danger in time to have avoided injury by stepping from the automobile although too late to stop it. It would excuse her if with knowledge of the actual danger she failed to warn her husband when with such warning, although too late to stop the automobile before reaching the track, he might have avoided the accident by driving it directly across it.

The defendant's exceptions to the charge are not placed upon this narrow ground, however. Its claim is that the charge deprived it of the benefit of the universal rule that a plaintiff who bases his right of action upon the negligence of another must prove his own due care. The charge recognizes the rule that the plaintiff could not recover if her own negligence contributed essentially to her injury; but it is claimed that the charge fixes an improper standard of duty, one which rendered her immune against any charge of negligence until she actually saw or knew

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of the danger. The general rule is that a plaintiff in an action for negligence must show that his injuries were not caused by his own want of reasonable care; and whether he exercised such care, and, if not, whether his failure to do so contributed essentially to his injury, are questions for the jury to determine from a consideration of all the circumstances of the case. This rule was not given to the jury in the present case. They were told that the question of the plaintiff's contributory negligence depended upon two facts: Did she see and know of the danger, and did she warn her husband? They were also told that she was not obliged to look out for danger. The burden of proving her own freedom from contributory negligence would be satisfied under the charge by evidence which persuaded the jury that she did not see or know of the approach of the car before the accident. Such an instruction in the husband's case would clearly have been erroneous. Does the fact that the plaintiff was a gratuitous passenger having no control of the automobile bring her within a different rule? That fact would have great weight in determining whether her conduct constituted due care. It would be one of the circumstances, and unquestionably an important one, to be considered in deciding whether her conduct was all that reasonable care on her part called for. A gratuitous passenger, in no matter what vehicle, is not expected, ordinarily, to give advice or direction as to its control and management. To do so might be harmful rather than helpful. But his presence in the vehicle may so obstruct the driver's view of a car or other approaching vehicle, or other circumstances of the situation may be such as to make it his duty to look out for threatened or possible dangers and to warn the driver of such after their discovery. This might be necessary for the passenger's as well as for the driver's safety. On the other hand the character of the vehicle in which he is a passenger may be such or his location in it or the other circumstances may be such that to look or listen for approaching cars or other dangers would be unnecessary and useless. For such a passenger to engage in conversation with fellow passengers and entirely neglect to look out for dangers or to observe the manner in which the vehicle is being operated might be the conduct of a reasonably prudent person. It cannot be said therefore that in every case and all the time it is the duty of a gratuitous passenger to use his senses or to look and listen in order to discover approaching vehicles or other dangers, or that his failure to do so would be a failure to exercise due care. But while this is so, the law fixes no different standard of duty for him than for the driver. Each is bound to use reasonable care. What conduct on the passenger's part is necessary to comply with this duty must depend upon all the circumstances one of which is that he is merely a passenger having no control over the management of the vehicle in

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which he is being transported. Manifestly the conduct which reasonable care requires of such a passenger will not ordinarily, if in any case, be the same as that which it would require of the driver. While the standard of duty is the same the conduct required to fulfill that duty is ordinarily different because their circumstances are different. Whether reasonable care has been exercised in either case is a question of fact for the jury.

In the following cases in this state it was held, or assumed without the precise point being discussed, that the same rule of reasonable care under all the circumstances is applicable to the case of a passenger which is applicable in other cases: *Fox v. Glastonbury*, 29 Conn. 204, 209; *Peck v. N. Y., N. H. & H. R. R. Co.*, 50 Conn. 379, 392; *Andrews v. N. Y., N. H. R. R. Co.*, 60 Conn. 293, 295, 22 Atl. 566. In other states where the precise point has been raised it is held with practical unanimity that the same rule applies. It will suffice to refer to the following cases selected from many cited in the defendant's brief: *Shultz v. Old Colony St. Ry. Co.*, 193 Mass. 309, 323, 79 N. E. 873, 8 L. R. A. (N. S.) 597, 118 Am. St. Rep. 502; *Allyn v. B. & A. R. R. Co.*, 105 Mass. 77, 79; *Smith v. Maine Cent. R. R. Co.*, 87 Me. 339, 340, 32 Atl. 967; *Whitman v. Fisher*, 98 Me. 575, 577, 57 Atl. 895; *Brickell v. N. Y. C. & H. R. R. Co.*, 120 N. Y. 290, 293, 24 N. E. 449, 17 Am. St. Rep. 648; *Read v. N. Y. C. & H. R. R. Co.*, 123 App. Div. 228, 107 N. Y. Supp. 1068; *Miller v. L. N. A. & C. Ry. Co.*, 128 Ind. 97, 27 N. E. 339, 340, 25 Am. St. Rep. 416; *Willfong v. Omaha R. R. Co.*, 116 Iowa, 548, 90 N. W. 358, 360.

The court gave the jury the proper standard by which to determine whether the husband was guilty of contributory negligence. It did not permit them to measure the plaintiff's conduct by the same standard. The jury found against the husband because they were not satisfied that he used reasonable care. Whether if permitted to measure this plaintiff's conduct by the same rule they would have reached the same result in her case we do not know. It cannot be said, therefore, that the defendant was not harmed by the charge unless we can say that upon the facts in the case the plaintiff was free from contributory negligence unless she actually knew of the danger in time to warn her husband. We have not the facts before us; only the claims of the parties as to what the evidence established. It would appear from the finding to be undisputed that the plaintiff was seated upon the left of her husband, the side from which the car approached, that there was a clear view of the defendant's track for more than half a mile to the west from a point 35 feet south of the track until the plaintiffs reached the track, and that they were alone in the automobile, and were not at the time engaged in any conversation. The plaintiffs claimed, but it was disputed,

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that the automobile was going at a speed of not more than four to six miles per hour. It was claimed by the defendants, but disputed, that the motorman sounded his gong as he approached the crossing. Each of the plaintiffs claimed to have looked to see whether a car was approaching and this plaintiff claimed to have listened also. We think that it was a question for the jury whether the evidence established the plaintiff's freedom from contributory negligence, and that the instruction that she could recover unless the jury should find that she saw the danger in time to warn her husband was erroneous. The defendant's request to charge upon this subject made her failure to use due care to see or hear the car coming prevent her recovery. This would be so provided the neglect was a proximate cause of the injury. But it would not prevent her recovery if the jury should also find from the other facts in the case that such neglect did not essentially contribute to her injury. The court might properly therefore refuse to give the request in the language in which it was presented.

The instruction that neither of the plaintiffs could recover without proof that the collision was caused by the defendant's negligence was in effect an instruction and a compliance with the defendant's request that they could not recover if the husband's negligence was the sole cause of it.

The defendant requested a charge that if the husband operated the automobile in a careless manner and the defendant acquiesced in this manner of operation she was bound by his negligence and could not recover. The fact that the plaintiff knew of the manner in which her husband was operating the automobile even if he was negligent in so operating it would not necessarily show that she was negligent in remaining in the automobile although she acquiesced in his manner of driving. There would be no acquiescence in his negligence so as to make it her own unless she knew or ought to have known that his manner of operating the machine was negligent. His negligence must have been so gross and so apparent that she was bound to know of it in order to make her chargeable with it. The charge upon this question was quite as favorable to the defendant as it was entitle to, and its request was properly refused.

There is error, and a new trial is ordered. The other Judges concurred.

STOTELMEYER v. CHICAGO, M. & ST. P. R. Co.

(Supreme Court of Iowa, July 9, 1910.)

[127 N. W. Rep. 205.]

Evidence—Photographs—Conclusiveness.—A photograph, while admissible as an aid in arriving at the truth, considered in the light of the evidence, with due regard to the natural limitations of photographs, is not so conclusive that the testimony of witnesses in apparent conflict with it must be disregarded.

Railroads—Accidents at Crossings—Contributory Negligence—Evidence.—In an action for injuries in a collision with a train at a highway crossing, evidence held to require submission to the jury of the issue of the contributory negligence of plaintiff and the driver of the vehicle.

Railroads—Accidents at Crossings—Contributory Negligence—Instructions.—Where, in an action for injuries in a collision with a train at a highway crossing, there was evidence that plaintiff when about 150 to 200 feet from the crossing stopped and looked for a train, and when about 40 or 60 feet away he stopped again, but saw no train, a charge that plaintiff and his driver were required to look and listen for trains within a reasonable distance from the crossing, and where this was done and no train was seen or heard, the jury must determine whether they were bound in the exercise of ordinary care, to stop and look and listen at some other point nearer to the crossing, etc., did not permit the jury to find that though plaintiff and his driver stopped and looked and listened when about 150 or 200 feet from the crossing and not afterwards, there was no contributory negligence, especially where the court in a subsequent instruction cautioned the jury against such an assumption.

Railroads—Accidents at Crossings—Contributory Negligence.*—Where the driver of a vehicle on approaching a railroad crossing looked for an approaching train and saw none, and there was none in plain sight or hearing so situated as to suggest a reasonable probability of danger in approaching the crossing, an occupant of the vehicle, chargeable with the negligence of the driver, was not guilty of contributory negligence because he failed to duplicate the action of the driver, but, where the driver looked and failed to see or hear when he ought to have seen or heard, his looking and listening was not a protection to the occupant, and he could not recover for an injury sustained in a collision with the train.

Railroads—Accidents at Crossings—Instructions.—In an action for injuries to an occupant of a vehicle in a collision with a train at a crossing, a charge that the negligence of the driver of the vehicle was imputable to plaintiff if it contributed to the injury, followed by a charge that ordinary care required that before the driver and

*See foot-note of preceding case.

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the occupant went on the crossing they should look and listen for trains, and that if they failed to do so they were guilty of contributory negligence, or if they or one of them looked and listened, and there was a train so situated as to suggest a reasonable probability of danger in approaching the crossing, there could be no recovery, was not prejudicial to the railroad, as imputing to plaintiff the driver's freedom from negligence.

Appeal and Error—Review—Discretion of Trial Court.—The court on appeal will not interfere with the discretion of the trial court in permitting leading questions.

Appeal and Error—Review—Harmless Error—Admission of Evidence.—Ordinarily the court on appeal will not reverse a case for an erroneous ruling in admitting immaterial evidence.

Appeal and Error—Review—Harmless Error—Admission of Evidence.—Where, in an action for injuries in a collision with a train at a crossing, plaintiff testified that he stopped, looked and listened twice before entering the crossing, and that he neither saw nor heard a train approaching, the error, if any, in permitting him to testify that if he had heard a train he would not have driven on the track was not prejudicial.

Appeal from District Court, Appanoose County; C. W. Vermillion, Judge.

Action for damages for personal injuries alleged to have been sustained in a collision at a highway crossing. There was a verdict and judgment for plaintiff. Defendant appeals. Affirmed.

F. S. Payne, J. C. Cook, and C. E. Broman, for appellant.
Howell & Elgin, for appellee.

EVANS, J. At the close of the evidence defendant moved for a directed verdict. This motion was denied by the trial court and error is assigned upon such ruling, and we give our first consideration to this question.

The accident involved in the inquiry occurred on February 17, 1907, at about 2 o'clock a. m., at a highway crossing across defendant's railway between Jerome and Seymour. The plaintiff and one Linn had procured a team and driver to take them from Jerome to Seymour. They were riding in a single-seated top buggy. The night was somewhat cold and the buggy top was up and inclosed by side curtains. The plaintiff and Linn occupied the seat proper and the driver, one Pollock, a boy 16 years of age sat upon their knees so that he occupied a position a little in front of them. They were driving east. The defendant's railway lay to the south of them before they reached the crossing, and extended in a general northeasterly direction. At the crossing in question the railway crossed the highway at an acute angle of about 20 degrees. For a distance of two or three hun-

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dred feet from the crossing the grade of the highway was about 6 feet lower than the grade of the railway; the highway rising quite abruptly to the grade of the railway in the last 25 feet west of the crossing. The center line of the highway entered the right of way space of the railway 185 feet west of such crossing. That is to say, at a point 185 feet west of the crossing, the center of the highway was 50 feet north of the center of the railway track. From this point the lateral approach of the highway to the railway was gradual. In the last 25 to 50 feet of the highway west of the crossing it was so close to the railway track that a train approaching from the southwest would come from behind a team driving east. To this extent the evidence is practically without dispute. The evidence also tended to show that along the south side of the highway there was a hedge which obstructed the view to the south, and this hedge extended east to a point about where the south line of the highway intersected the north line of the right of way. The plaintiff testified that at a point about 150 or 200 feet west of the crossing they stopped the team, and that he and the driver looked in both directions for a train and saw none; that this occupied about two minutes' time; that at 50 or 60 feet from the crossing they stopped again and looked likewise and failed to see any train; that they were driving on a walk; that the road at this point was a narrow embankment 12 or 14 feet wide, with the railway to the right of them and a ditch to the left of them which prevented any escape by turning around in case of emergency; that when they were about 25 feet from the crossing, the light of the approaching train suddenly streamed upon them; that the driver tried to stop his team, but it became unmanageable and rushed forward, that a collision thereby occurred which resulted in the killing of the driver and one of the horses, and in an injury to the plaintiff who was carried upon some part of the locomotive for a distance of 650 feet.

Much testimony was introduced on behalf of plaintiff to the effect that the hedge referred to was such an obstruction to the view that a train could not be seen from the highway until within a very short distance from the crossing. On the other hand, the defendant put in evidence certain photographs and plats and certain measurements tending to show that from any point 215 feet or less on the highway west of the crossing, a clear view could be had of the railway track for a distance of from 1,000 to 2,000 feet. It is argued that this evidence is conclusive, and that the court should accept it as such, and that the testimony on behalf of plaintiff should be disregarded in so far as it appears to contradict this evidence on behalf of defendant. It is upon this theory that the defendant contends for its right to a directed verdict. There are several reasons why the defendant's position is not tenable. We have examined the photographs,

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and they do not impress us as at all conclusive in support of the defendant's theory. It is a matter of common knowledge that a photograph is not always true in its perspective and does not necessarily present distances nor angles as they are. Nor does it always present the relative size or relation of objects at varying distances. This is illustrated by an examination of the three photographs introduced in evidence by the defendant, which present to the eye a somewhat conflicting appearance of the same topographic view. While, therefore, a photograph has its proper uses and is a great aid in arriving at the truth, it may also have its own unavoidable deceptions. It is a matter of common observation that the photographs introduced in evidence by opposite parties sometimes present as great apparent conflict as the testimony of opposing witnesses. The most, therefore, that can be said for photographic evidence is that in any given case it must be considered in the light of all the evidence, and with due regard to its natural limitations.

The measurements and plats introduced by the defendant tend to show that at a point 230 feet west of the center of the crossing the railway track would be visible to a person on the highway for a distance of less than 600 feet west of the crossing. This latter distance of view of the track would diminish as the distance from the crossing to the point of view on the highway was increased. It is argued that the plaintiff, from any point of the highway within 200 feet of the crossing, could have seen the train 1,000 feet or more southwest of the crossing, and that he was therefore necessarily guilty of contributory negligence in failing to discover the train before reaching the point of collision. It is conceded that the train was going at a very high rate of speed, estimated by defendant's witnesses at 35 to 40 miles an hour. It came down a descending grade, there being a fall of 4 feet in the 1,140 feet of track next west of the crossing. Just west of the crossing there was a comparatively sharp curve in the track bearing more to the south of west. Assuming the truth of plaintiff's testimony that at 50 or 60 feet from the crossing they did stop and look and listen for a train in both directions, and that this stop occupied one minute or more, it does not follow that they must have seen the approaching train at that time. Plaintiff was required to look in both directions. The stopping and adjusting of robes and starting occupied a little time, and it was not impossible that the train could have been more than 2,000 feet away at the very moment that the plaintiff or the driver looked in that direction and yet have covered the distance in time for the collision. There is the further consideration that at this point the position of the buggy was such that the occupants must look behind them, in order to locate the train. They

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could fail to take accurate account of the curve, and thus fail to look in exactly the right direction.

It cannot be said as a matter of law that such a mistake, if made, would be negligence. The testimony on behalf of plaintiff shows that the train approached the crossing without any signals, either of whistling or ringing the bell. It must be borne in mind also that this is not a case where the plaintiff or his driver drove upon the track. The defendant has argued this case as though it were the ordinary case of a plaintiff driving upon the track in necessary view of an oncoming train, and the authorities cited are cases of that character. In such case the power of the driver to save himself by stopping his team exists ordinarily up to the very moment that he passes upon the track, and his duty to exercise his senses of sight and hearing before he does so is imperative. In this case, the plaintiff and the driver did not come voluntarily within 25 feet of the crossing proper, although the lateral distance between them and the track was somewhat less. True, they were within the zone of danger in that their proximity to the track might result in the frightening of their horses by the passing train. But they had to encounter this danger for a linear distance of nearly 200 feet. This particular danger necessarily increased as they approached the crossing. At what particular point in such approach such danger became imminent or forbidding was a question upon which there might be a fair difference of judgment. Certain it is that for the full distance of 185 feet some risk of subjecting the horses to fright had to be taken, unless a train was actually in sight when that portion of the approach was entered. Whether, therefore, under all the circumstances, disclosed by the evidence, the plaintiff and the driver were free from negligence in their method of approach to such crossing, was, in our judgment, clearly a question of fact to be determined by the jury, and the trial court did not err in refusing to direct a verdict on the ground of contributory negligence.

2. Complaint is made of the fifteenth instruction given by the trial court, which is as follows: "(15) Plaintiff and said driver were required to look and listen for approaching trains within a reasonable distance from the crossing, and if this was done and no train was seen or heard it is for the jury to say whether they were bound in the exercise of ordinary care to stop and look and listen or to look and listen without stopping at some other point nearer to the crossing, and while negligence, if any, on the part of the defendant's employees operating said engine would not excuse plaintiff or said driver from exercising due care on their part, yet they had a right to assume that the crossing signals required by law would be given, and that an engine approaching said crossing would not be negligently operated."

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It is not claimed that this instruction is not correct as an abstract statement of the law. It is claimed, however, that by applying it to the particular evidence of this case it would permit the jury to find that even though the plaintiff had stopped and looked and listened only when about 150 or 200 feet from the crossing and not afterwards, that such stopping and looking and listening at such distance was a sufficient showing of want of negligence. It is argued that the jury should have been instructed that under such a state of facts the plaintiff was guilty of negligence as a matter of law. This argument rests upon a very strained construction of the instruction, even though it stood alone. In the light of other instructions given, the argument had no basis whatever. And this remark disposes also of the claim of conflict between the fifteenth and sixteenth instructions. The sixteenth instruction guarded the jury against the very assumption which appellant claims the jury might have adopted under instruction 15. In other words, the construction of instruction 15 adopted by appellant in argument is negatived by instruction 16, and this is the only conflict presented.

3. In a number of instructions the trial court laid upon the plaintiff the burden of proving not only that he himself was free from negligence contributing to his injury, but that the driver was also free from such negligence. In other words, the trial court instructed the jury that the negligence of the driver would be imputed to the plaintiff, if it contributed to the injury. It is argued by appellant that this was erroneous, and authorities are cited to the effect that the negligence of a driver under such circumstances cannot be imputed to the plaintiff. *Nesbit v. Town of Garner*, 75 Iowa, 314, 39 N. W. 516, 1 L. R. A. 152, 9 Am. St. Rep. 486; *McBride v. Des Moines*, 134 Iowa, 398, 109 N. W. 618; *Willfong v. O. & St. L. R. Co.*, 116 Iowa, 548, 90 N. W. 358; *Bailey v. Centerville*, 115 Iowa, 271, 88 N. W. 379. Appellant conceded that on the face of it this error only laid an undue burden upon the plaintiff, and furnished appellant no ground of complaint. It is argued, however, that the indirect effect of this instruction was prejudicial to the defendant in that, as a matter of argument, if the negligence of the driver could be imputed to the plaintiff, his freedom from negligence could likewise be imputed to the plaintiff, and that the defendant suffered at this point. In elaboration of this argument it is said that the court adopted this view in its fourteenth instruction which is as follows: "(14) The exercise of ordinary care required that before they went upon said crossing plaintiff or said driver should look and listen for trains, and if they failed to do so it would constitute contributory negligence, or if they or one of them did so look and listen and there was a train then in plain sight or hearing so circumstanced or situated as to suggest a reasonable probability of danger in going upon the track

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or in approaching nearer thereto, then to do so would constitute contributory negligence, and in either case plaintiff could not recover."

Without passing upon the abstract correctness of this instruction, it is clear to us that it presents no ground of complaint to the appellant. This instruction dealt with contributory negligence as a question of law. Surely, if the driver looked for an approaching train and saw none, and there was none in plain sight or hearing so situated as to suggest a reasonable probability of danger in going upon the track or in approaching thereto, it cannot be said as a matter of law that the plaintiff was guilty of contributory negligence in merely failing to duplicate the action of the driver. The instruction gave the plaintiff no protection against the negligence of the driver in this respect. If the driver looked and failed to see or hear when he ought to have seen or heard, then his looking and listening was not a protection to the plaintiff under this instruction. The driver was in a better position to look and listen than was the plaintiff. If the driver did look and listen and did exercise reasonable care under all circumstances, it was a proper circumstance to go to the jury on the question of plaintiff's contributory negligence. The instruction complained of went no further than this, and we have no occasion to consider the question whether, if the driver exercised reasonable care, such care should be imputed to the plaintiff as a matter of law.

4. During the examination of plaintiff as a witness, his counsel put to him the following questions: "Q. George, if you would have heard any train, tell the jury whether or not you would have drove right up on the track or had the driver do so? A. No, sir; I would not. Q. If you had heard that whistle, would you have permitted, if you could have helped it, the driver to drive towards the track after hearing the blasts until after the train passed? A. No; I would not have had him to drive up there if I could have helped it." These questions were objected to by the defendant, and the objections were overruled. The evidence was clearly incompetent, but it is not claimed that any objection was made to it on that ground. It is stated in appellant's abstract that these questions were objected to as "leading and immaterial." It is claimed in appellee's abstract that the only objection urged was that each question was "leading." The questions were not vulnerable to the objection that they were leading, and if they had been, we would not interfere with the discretion of the trial court in permitting leading questions. Nor would we ordinarily reverse a case for an erroneous ruling in receiving evidence that was merely immaterial. The objection that proposed evidence is immaterial is intended more for the protection of the court and its record and the dispatch of public business, than for the special benefit of the litigants as such. We

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think this evidence now under consideration was clearly nonprejudicial, even though the objection of incompetency had been made to it.

5. Other points are presented by appellant. But they are so related to the points already considered that what we have said is decisive of them all.

We find no error in the record, and the judgment of the court below must be affirmed.

WARN v. CHICAGO GREAT WESTERN RY. CO.

(Supreme Court of Iowa, July 8, 1910.)

[126 N. W. Rep. 1104.]

Railroads—Injury at Crossing—Sufficiency of Evidence to Support Verdict.—In an action against a railroad company for injuries caused by frightening the horse driven by plaintiff's minor son, evidence held sufficient to support a verdict for plaintiff.

Railroads—Failure to Ring Bell at Crossing.*—Where a railroad company did not obey a statute requiring the company to ring its engine bell continuously for at least 60 rods as the engine approaches any street crossing, it is liable not only for an injury occurring at such crossing, but for injuries to persons who were driving on a street along with a railroad track extended, and whose horse was frightened by the approach of an engine without the required warning, although such persons had not arrived at the street crossing the railroad track.

Appeal from District Court, Marshall County; J. M. Parker, Judge.

Action to recover damages for personal injuries resulting to the minor son of plaintiff from being thrown out of a buggy by reason of the frightening of the horse attached thereto, while said son was attempting to drive across the track of defendant's road in the city of Marshalltown at a street intersection; the allegations of negligence being that the engine and cars of the

*For the authorities in this series on the question whether it is actionable negligence to have failed to give crossing signals where the accident was not at the crossing, see foot-note of *Lynch v. Great Northern Ry. Co.* (Mont.), 32 R. R. R. 672, 55 Am. & Eng. R. Cas., N. S., 672.

For the authorities in this series on the question whether a railroad is liable for the frightening of teams by trains resulting from failure to give crossing signals, see foot-note of *Illinois Cent. R. Co. v. Armstrong* (Miss.), 31 R. R. R. 199, 54 Am. & Eng. R. Cas., N. S., 199; *Barton v. Southern Ry. Co.* (Ga.), 33 R. R. R. 516, 56 Am. & Eng. R. Cas., N. S., 516; *Skipworth v. Mobile & O. R. Co.* (Miss.), 32 R. R. R. 697, 55 Am. & Eng. R. Cas., N. S., 697.

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defendant which frightened the horse were operated at an unlawful rate of speed, and without the giving of the signals required by statute and ordinance. There was a verdict for plaintiff, and from judgment on such verdict defendant appeals. Affirmed.

Carr, Carr & Evans and *Carney & Carney*, for appellant.
Theo. F. Bradford and *R. E. Johnson*, for appellee.

MCCLAIN, J. The minor son of plaintiff for injury to whom this action is brought, accompanied by a younger brother, was driving a single horse in a buggy westward along Nevada street in the city of Marshalltown on which street there are tracks of the defendant railway occupying the north half of the street, and on reaching Eighth avenue, running at a right angle with Nevada street, he turned to the north, as alleged in the petition, in order to cross the tracks of the defendant road and proceed up Eighth avenue. The two boys, who were the only witnesses for plaintiff as to what happened, testified that they had crossed the first track and were approaching the second when three cars backed by an engine came upon them from the west, and their horse becoming frightened swung around suddenly to the west towards the approaching cars and threw the older boy out of the buggy, causing his arm to be broken. It is for this injury that action is brought. These two witnesses testified also that the engine and cars approached the crossing at a higher rate of speed than permitted by statute or ordinance, and without ringing of the bell on the engine as required by the city ordinance on the subject, and their testimony tended to show that if they had been aware of the approach of the engine and cars they could have avoided the accident. The testimony of witnesses for the defendant not only tended to negative the unlawful speed of the engine and cars and the failure to give a signal or warning, but also tended to show that at the time the horse was frightened the vehicle had not yet reached Eighth avenue, but was being driven westward along Nevada street south of the defendant's tracks, and that the horse being frightened jumped south and ran southwest, striking a switch stand which was on the south line of Nevada street and east of Eighth avenue, and that it was at this point that the accident occurred. There is some corroboration of the testimony of defendant's witnesses as to the place of the accident in the testimony of the boy who was not injured, for according to his account of what happened the horse did bring the buggy into collision with the switch stand, although the injured boy was thrown out before the buggy collided with the switch stand. We think, however, that the testimony is not so conclusive as to the place and manner of the accident as that we would be justified in reversing the case on the ground of the insufficiency of the evidence to support the verdict.

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The case was submitted to the jury on the theory of the allegations of the petition, which there was evidence tending to support, that while the boys were attempting to cross defendant's track at Eighth avenue the cars were backed down from the west without warning and at a negligent and unlawful rate of speed. The complaint of appellant in this respect is that if, as the testimony of defendant's witnesses tended to show, the horse became frightened while on Nevada street before the boys had turned north on Eighth avenue to cross the tracks, and in consequence of this fright the buggy was upset and the injury complained of resulted, then defendant would not be liable because it had the equal right with the travelers on Nevada street to the use of that street, and if the horse was frightened by the appearance of the train and the ordinary noises of its passage, there can be no recovery by plaintiff, and that failure to ring the bell could not have been the cause of the frightening of the team.

But the statute required the bell to be rung continuously for at least 60 rods as an engine approaches any street crossing, and if the defendant's employees operating the engine in question did not ring the bell before approaching the Eighth avenue crossing, then there was such negligence as to render the defendant liable not only for an injury occurring at such crossing, but for injuries to person near the track who would have been warned by such signal of approaching danger and enabled to avoid it. *Loneragan v. Illinois Cent. R. Co.*, 87 Iowa, 755, 49 N. W. 852, 53 N. W. 236, 17 L. R. A. 254; *Ward v. Chicago, B. & Q. R. Co.*, 97 Iowa, 50, 65 N. W. 999; *Heise v. Chicago Gt. W. R. Co.*, 141 Iowa, 88, 119 N. W. 371. Therefore the fact that the boys who were in charge of this horse had not yet turned up Eighth avenue and were not in the act of crossing the tracks when their horse was frightened by the approach of the engine and cars without the required warning would not as a matter of law, relieve the defendant from liability for failure to ring the bell on approaching that crossing, if it should appear that had the bell been rung, the boys, advised by the signal, could have taken precautions against the frightening of their horse which they did not take by reason of ignorance of the danger, and the instructions asked for defendant, to the effect that plaintiff could not recover if the horse was frightened while being driven along Nevada street, and not while being driven across the tracks at Eighth avenue crossing, was not in accordance with the law. It is true that the plaintiff did not ask recovery on the ground that the horse was frightened on Nevada street before the boys turned north on Eighth avenue and commenced to cross the tracks, but the court did submit the issue tendered in the pleadings as to whether the accident happened at the crossing on Eighth avenue in consequence of the failure to give the proper signal on the approach to the crossing, and it would not have been pertinent

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to this issue to instruct the jury that there would be no liability if the horse was frightened on Nevada street before it had reached the crossing. Therefore we see no error in the refusal to give this instruction. Under the pleadings it would perhaps not have been proper to allow a recovery for the frightening of the horse at some other place on Nevada street than at the Eighth avenue crossing, but the court did not submit any such issue.

Under the issue presented to the jury the evidence for defendant that the accident happened before the boys had reached the Eighth avenue crossing was pertinent, and under the instructions could have been considered only as negating the happening of such an accident as was alleged in the petition, and under the instructions the jury must have considered the evidence as bearing upon that question. The appellant cannot complain that the court did not submit the question as to the liability of appellant if the accident happened as described by its witnesses, for appellant would not have been free from responsibility as a matter of law, even if the accident so happened.

We reached the conclusion therefore that the court did not err in the instructions given or in refusing those asked, and that the verdict has support in the evidence as to the issues upon which the case was tried, and the judgment is therefore affirmed.

BERG v. DULUTH, S. S. & A. RY. CO.

(Supreme Court of Minnesota, July 1, 1910.)

[126 N. W. Rep. 1094.]

Railroads—Trespassers.*—According to the law of the state of Michigan, as defined by the decisions of the Supreme Court of that state, a child 11 years of age, who enters a railway yard for the purpose of catching rides on trains, is a trespasser, and the doctrine of the turntable cases has no application.

Railroads—Trespassing on Cars—Invitation—Evidence.*—Certain boys of the village through which respondent railway company operated its railway were permitted to climb upon, help clean, and occasionally ride upon a freight engine which was located on a track some distance from the main railway yards and in charge of a day watchman. The boys also occasionally climbed upon box cars during

*For the authorities in this series on the subject of the care due from a railroad company to children trespassing on its cars or premises, see foot-note of *Covington Transfer Co. v. Mulvey* (Ky.), 35 R. R. 11, 58 Am. & Eng. R. Cas., N. S., 11; second head-note of *Chesapeake & O. Ry. Co. v. Hawkins* (C. C. A.), 34 R. R. 757, 57 Am. & Eng. R. Cas., N. S., 757; last head-note of *Berry v. St. Louis, etc., R. Co.* (Mo.), 33 R. R. 243, 56 Am. & Eng. R. Cas., N. S., 243.

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switching operations in the yard, and they were in the habit of lining up along the side of the freight train which daily passed through the village, and caught rides by grabbing hold of the ladders on the side of the cars when the train started up, and then jumped off before it got under full speed. Held, the evidence was not sufficient to establish an invitation to the boys to ride, and the company is not liable in damages to a boy 14 years old, who was injured in attempting to catch a ride in the manner stated.

(Syllabus by the Court.)

Appeal from District Court, St. Louis County; J. D. Ensign, Judge.

Action by Amalia Berg, mother of G. B. Berg, an infant, against the Duluth, South Shore & Atlantic Railway Company. Verdict for defendant. From an order denying a new trial, plaintiff appeals. Affirmed.

Victor Linley, P. H. O'Brien, and Ludvig Arctander, for appellant.

Thomas S. Wood and C. O. Baldwin, for respondent.

LEWIS, J. Appellant company was operating through the village of Barraga, Mich. The main track passed the east side of the depot upon a slight curve. One switching track commenced on the west side of the depot platform and connected with the main track about 300 feet north of the platform. Two other tracks, used for logging purposes, branched off from the main track to the east and connected with it, one at a point about 200 feet north of the platform, and the other about 150 feet north. The section house was located on the west side of the main track at a point about 1,200 feet north of the depot. There was a beaten path from the section house to the depot along the west side of and close to the main track. The tracks which branched off from the main track and ran east were used for logging purposes, and a logging engine was employed in hauling logs from the woods to the east up to the main track. During the day this engine was stationed on one of the logging tracks at a point nearly opposite the depot, and in charge of a watchman whose duty it was to keep it clean and keep up the steam ready for the night work of hauling logs. The station agent had possession of the key to the switches. A freight train passed daily through the village between 4 and 5 o'clock p. m., going north, and stopped there for the purpose of unloading freight, and taking on and switching off cars. On April 5, 1907, George Berg, appellant's son, who was then about 11 years old, attempted to catch hold of the ladder on the side of one of the box cars of this freight train just as it was leaving Barraga, and in doing so lost his hold and fell under the wheels receiving injuries which necessitated the amputation of both legs.

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The complaint alleges "that for many weeks prior to the date of the injury to plaintiff's son a crowd of boys, about a dozen in number, including plaintiff's son, attending said school, were in the habit of going to said depot grounds of defendant, out of school hours daily, where they, said school boys, including plaintiff's son, and other boys as well, were allowed, permitted, encouraged, and invited by defendant to jump on, grab hold of, and ride cars, engines, and trains when passing through, stopping, and starting at Barraga, and, when switching was being done in said depot grounds, upon cars, engines and trains doing the same; that among other things said boys were allowed, permitted, encouraged, and invited to run switch engines up and down the tracks in said depot grounds, to ring the engine bell, to climb upon box cars and set brakes when flying switches were being made and on stationary cars as well, to ride upon the trucks of moving cars, to hang onto moving cars when switching was being done, and many other similar dangerous practices." The complaint further states that it was the daily practice of such crowd of boys, when trains were ready to move out of the depot grounds of Barraga, or were moving out, to jump on, grab hold of the ladders on the cars and ride for some distance, all of which was done with the allowance, permission, encouragement, and invitation of the defendant, by reason of which George Berg was attracted to the trains by seeing the other boys daily visiting the depots grounds and catching rides by running along the side of the train when it started, and getting on in the manner stated, and that he was neither warned nor prevented from so doing.

There is evidence to show that the watchman of the logging engine, which was stationed on one of the side tracks during the day, permitted several boys to get on the engine, help clean it, ring the bell, and occasionally ride on it when moved up and down the tracks. But this engine was used only at night, and it does not appear for what purposes it was necessary to move it during the day. It was stationed on one of the logging tracks some distance from the depot yards, and whatever invitation was held out to the boys to assist the watchman in cleaning it, ringing the bell, etc., cannot be considered as an invitation to them to go upon the depot grounds, and to jump upon or to take hold of or ride upon the cars which were being switched to make up the train on the main track, or to ride upon the train when it left the station. There is also evidence tending to show that, for a number of months prior to the time of the accident, boys of the village, after school hours, had been in the habit of loitering around the depot grounds, and on two or three occasions had been seen to climb upon the top of box cars after a brakeman, and to ride on the cars when they were being switched out to the main track. Two witnesses testified to this effect, and one that she had seen two boys set the brakes on top of one of the

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cars being switched. Two witnesses testified that they had seen boys on the caboose steps with the brakeman, but these acts were not general. It was the custom, however, for a half a dozen or more of the boys to line up along the side of the freight train after it was made up and ready to start, and then, after it had started run along and catch hold of the ladders on the sides of the cars and ride up as far as the section house and drop off.

We think it must be taken as fairly proven by creditable evidence that this practice was continuous, almost daily, for a number of months. The plaintiff did not plead, or attempt to show at the trial, that there was any direct or express permission to any of the boys to ride or get on any of the cars, but contends that it should be implied that an invitation was held out to the boys by not taking some active steps to stop the practice. As bearing on this question, it was shown that the boys were in such a position, when climbing on the cars when the train started, that they must have been seen by the conductor, or the brakemen at the rear of the train, or by the engineer or fireman in the engine. On the part of respondent, the members of the train crew all testified that they knew the boys were in the habit of jumping on the cars and taking rides, and they made every effort they could to keep them off; that they never allowed them to ride when they could catch them at it; and that the boys understood it, and never attempted to get on the cars, except when the trainmen were in a position where they could not see them to drive them off. None of the boys identified as those in the habit of catching rides were called as witnesses on the part of the appellant, except her son, George Berg, and, although he did not testify that the brakemen actually saw him, he said they were in a position to see him when he caught rides. One of the witnesses for appellant, Johnson, testified on cross-examination that he saw the brakemen chase the boys off on several occasions, and several of the boys, identified by George Berg as those he had seen taking rides, were called as witnesses on behalf of the defense, and all testified that their practice was to grab the ladders after the train started, and that they were chased off whenever seen. One witness for appellant, Funke, testified that on one occasion George climbed on top of a stationary freight car, loosened the brake, and let it run down to the other end of the yard; but this was denied by George, who claimed it was his younger brother.

Under the state of facts established by the evidence, was it the duty of respondent railway company to take more active or different measures to break up such practice? The company was not required to bring its train to a standstill in order to drive the boys off, and, even if that had been done, would it have prevented them from repeating the act when the train started again? The train was generally a long one, and the crew

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consisted of a conductor, three brakemen, the engineer, and the fireman, and it would be unreasonable to require the company to employ a greater number of brakemen than necessary for its purposes just to see that boys did not steal rides. True, a number of watchmen might have been employed to patrol the grounds and drive the boys away, or cause their arrest for trespassing upon the railroad grounds. But, as we understand the law of Michigan, this was not required. In this case we have to be guided by the decisions of the Supreme Court of that state, and are of opinion that that court has settled the questions involved contrary to the views of appellant. The Michigan court has never adopted the rule of this and some other states, known as the rule of the turntable cases, which makes an exception in the case of children who may have been drawn by curiosity upon the premises of another and injured by exposed machinery. In *Ryan v. Towar*, 18 Mich. 463, 87 N. W. 644, 55 L. R. A. 310, 92 Am. St. Rep. 481, that court lays down the rule that an invitation or license to cross the premises of another cannot be predicated on the mere fact that no steps were taken to interfere with such practice, and that there is no difference between children and adults which will warrant the inference of an invitation to enter upon the premises of another, and that no exception to the rule exists in favor of children injured by dangerous machinery naturally calculated to attract them to the premises. The rule was applied to a case where a girl 13 years old, with other children, was in the habit of crossing the land on which a certain building was located without objection on the part of the company, and she was injured while attempting to save a younger sister, who had become caught between a water wheel and the wheel pit. That case is approved in *Habina v. Twin City General Electric Company*, 150 Mich. 41, 113 N. W. 586, 13 L. R. A. (N. S.) 1126, where it was distinctly held that the fact that the company did not deny the public the privilege of traveling over its lands in any direction did not impart to such property the character of a highway and give to individual members of the public rights similar to their privileges in a highway; that the company was not liable for an injury sustained by a licensee from falling into an unguarded ditch while in the exercise of proper care, in the absence of evidence indicating that the act of leaving the ditch open was a reckless and wanton act. The injured person was a licensee, yet the company owed her no duty to notify her of the change in the condition of the premises, and was not liable for her injury, though there were no barriers to the ditch. In *Trudell v. Grand Trunk Ry. Co.*, 126 Mich. 73, 85 N. W. 250, 53 L. Ed. 271, that court held that a boy 7 years and 4 months old, playing on the railroad right of way, was a trespasser as a matter of law, and that the company was not

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liable, except when guilty of gross negligence. And further, in the case of *Kaumeier v. City Electric Ry. Co.*, 116 Mich. 306, 74 N. W. 481, 40 L. R. A. 385, 72 Am. St. Rep. 525, the court declared that one who in sport attempts to make use of a street car left unguarded upon the track in the public highway is a trespasser, and that the company was not liable to a child injured by falling under its wheels while it was being pushed along the track by her companion, although the company knew that such use was made of the car when left unguarded. See, also, *Formall v. Standard Oil Co.*, 127 Mich. 496, 86 N. W. 946; *Peninsular Trust Co. v. City of Grand Rapids*, 131 Mich. 571, 92 N. W. 38; *Baker v. Flint & Pere Marquette R. Co.*, 68 Mich. 90, 35 N. W. 836; *Clark v. Michigan Central R. Co.*, 113 Mich. 24, 71 N. W. 327, 67 Am. St. Rep. 442.

Appellant has called our attention to a line of cases where the injured children were not trespassers. Those cases are not in point here for that very reason. In *O'Leary v. Michigan State Telephone Co.*, 146 Mich. 243, 109 N. W. 434, the plaintiff was a child seven years old, who with other children was playing in the street near his father's house, and was injured by being caught in a snatch block, or rope and pulley, which was being used to stretch a wire. The child was not a trespasser in the public street, and the question of negligence on the part of the telephone company and contributory negligence on the part of the child were questions of fact for the jury. The case of *Kaumeier v. Railway Co.*, supra, and other cases, were reviewed and distinguished as follows: "There is reasonable ground for distinction between a case where something is left in the highway which can only injure a child by his meddling with it and putting it into operation, in the absence of the owner or person having it in charge, and a case where, like the present, when the owner is present, operating the apparatus, and has actual notice that the children are attracted by the tackle, and will play with it unless prevented." In *Iamurri v. Saginaw City Gas Co.*, 148 Mich. 27, 111 N. W. 884, the court divided, and a majority held that the company was liable for damages to a child playing near, by the explosion of a tank wagon which had been left unguarded in a public highway. *Boehm v. City of Detroit*, 141 Mich. 277, 104 N. W. 626, involved an injury to a child who fell into a hole in a defective sidewalk; and in *Powers v. Harlow*, 53 Mich. 507, 19 N. W. 257, 51 Am. Rep. 154, the injured boy was rightfully upon the premises, and it was held that an action would lie against the landlord for the injury because the child's father had a right to be on the premises and was working near by. In *Ecliff v. Wabash, St. Louis & Pac. Ry. Co.*, 64 Mich. 196, 31 N. W. 180, the company was held negligent in permitting a 12 year old boy to ride on the front of an engine pulling a train tender

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foremost, which collided with another engine; but in that case the boy was guilty of contributory negligence and could not recover. That case differs from the one under consideration in the fact that the boy had repeatedly ridden in a place where it would have been easy to prevent it.

Finding no liability under the law as announced by the Supreme Court of Michigan, the order appealed from is affirmed.

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(Supreme Court of Iowa, July 8, 1910.)

[126 N. W. Rep. 1118.]

Street Railroads—Operation of Cars—Duty of Motorman.*—The duty of a motorman on a street car to keep a lookout for persons within or approaching the zone of danger, is different from that of an engineer in charge of an engine operated on a railroad right of way where there is no reason to anticipate the approach of persons.

Street Railroads—Collisions—Evidence—Instructions.—Where, in an action for injuries to a person struck by a street car, the evidence showed that the motorman saw plaintiff working near the track in such a position that he was not likely to observe the approach of the car and apparently not giving attention to such approach, in time to stop the car before the accident, and that it was apparent to the motorman that plaintiff believed that the car was running on the other track according to custom, the court properly submitted the case on the theory that if the motorman saw, or, in the exercise of reasonable care, might have seen, that plaintiff was in a position of danger from the car or was putting himself in a position of danger without noticing the approach of the car, and if he failed to exercise reasonable care to stop the car before the accident, the street railroad was liable, notwithstanding plaintiff's negligence in putting himself in a position of danger.

Street Railroads—Operation of Cars—Duty of Motorman.†—Though a motorman need not anticipate that a person not in a po-

*For the authorities in this series on the subject of the duty of those in charge of street cars to lookout in order to avoid collisions with other users of streets, see last foot-note of *South, etc., Ry. Co. v. Crutcher* (Ky.), 35 R. R. R. 199, 58 Am. & Eng. R. Cas., N. S., 199, where all those preceding it are collected; first foot-note of *Engvall v. Des Moines City Ry. Co.* (Iowa), 35 R. R. R. 266, 58 Am. & Eng. R. Cas., N. S., 266.

†See first foot-note of *Neary v. Northern Pac. Ry. Co.* (Mont.), 31 R. R. R. 758, 54 Am. & Eng. R. Cas., N. S., 758; first head-note of *Norfolk & W. Ry. Co. v. Dean's Adm'x* (Va.), 26 R. R. R. 784, 49 Am. & Eng. R. Cas., N. S., 784.

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sition of danger from an approaching car will negligently put himself in such a position, a motorman seeing that a person is apparently placing himself in a position of danger, without being aware of the car's approach, must take cognizance of that fact and avoid injury if practicable, and the negligence of the person in danger will not relieve the street railroad from liability for the negligence of the motorman in not taking reasonable precautions to avoid the accident.

Negligence—"Last Clear Chance Doctrine."‡—The doctrine of the last clear chance does not involve the recognition of liability in case of concurrent negligence, and does not involve a case of comparative negligence, but requires one to use reasonable care not to injure another in the condition in which the latter has placed himself, though the latter is guilty of negligence in putting himself in a place of danger avoidable by reasonable precautions.

Appeal and Error—Excessive Damages—Review.—Where, in a personal injury action, the court reduced the damages from \$17,000 to \$10,000, on the ground that the jury misconceived the measure of damages, and not on account of passion or prejudice, the court on appeal would permit the reduced verdict to stand.

Appeal from District Court, Scott County; Jas. W. Bollinger, Judge.

Action to recover damages for personal injuries alleged to have resulted from negligence of employees of the defendant company in operating a street car so that the same ran against and upon the plaintiff. There was a trial to a jury, and a verdict for the plaintiff for the sum of \$17,000. On a motion for a new trial, the court required the remission of the excess in the verdict over \$10,000. Plaintiff elected to accept a judgment for that amount, and from such judgment the defendant appeals. Affirmed.

Lane & Waterman and *Cook & Balluff*, for appellant.

Ely & Bush, and *Wade, Dutcher & Davis*, for appellee.

McCLAIN, J. The plaintiff at the time of receiving the injury complained of was in the employ of the People's Light Company which was laying a main along the north side of East River street in the city of Davenport, a street running practically east and west on which were two lines of track of the defendant

‡For the authorities in this series on the subject of the last clear chance doctrine, see third foot-note of *Bruggeman v. Illinois Cent. R. Co.* (Iowa), 35 R. R. R. 241, 58 Am. & Eng. R. Cas., N. S., 241; third head-note of *Powers v. Des Moines City Ry. Co.* (Iowa), 34 R. R. R. 597, 57 Am. & Eng. R. Cas., N. S., 597; first foot-note of *Bourrett v. Chicago, etc., Ry. Co.* (Iowa), 34 R. R. R. 284, 57 Am. & Eng. R. Cas., N. S., 284; fourth foot-note of *Norfolk & P. Traction Co. v. Forrest's Adm'x* (Va.), 33 R. R. R. 472, 56 Am. & Eng. R. Cas., N. S., 472.

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street car company. His business at the time was to work at pumping water from the ditch by means of a pump and hose, and discharge it through a simple wooden trough across the north railway track. His hours of work were during the night-time, and extended until the time for the regular force of men to go to work in the morning. The street cars of the defendant ran along the tracks in this street about 20 minutes apart each way until midnight, and then about one hour apart each way until about 5 o'clock in the morning, when cars were started out again on the shorter schedule. While cars were being run on their regular schedule, the cars were run west on the north track and east on the south track, but it seems that for some reason connected with the convenient distribution of the cars the first car started out in the morning on the shorter schedule would run west on the south track instead of on the north track, and it was this first car running west on the south track which collided with the plaintiff and caused the injury complained of.

From the evidence the jury may have properly found that plaintiff had been directed by his employer, when he saw a car approaching on the north track which would usually be from the east, to pick up the end of his trough and lay it between the two tracks leaving the north track free for the passage of the approaching car and that in doing so he should face to the west so as to see any car approaching from that direction on the south track which would put him in peril. In other words, his duty seems to have been to get his trough off of the north track when a car was approaching on that track and to pass far enough to the south to be out of the way of the approaching car which would usually be from the east, and at the same time keep a lookout for a car from the west; for there was not sufficient room between the two tracks to enable the plaintiff to stand in such a position to be at once out of danger from cars either way. The jury might also have found under the evidence that on this particular occasion the plaintiff saw the car which subsequently collided with him approaching from the east around a slight curve, and, supposing it to be on the north track as usual, picked up the north end of his trough and carried it eastward and south in order to clear the north track and placing himself on the south track, or so near thereto, as to be in danger of collision with the car from the east which was in fact on the south track. Had plaintiff observed that the car was in fact on the south track, there would have been no occasion for him to move his trough and he might have continued his occupation of pumping without interruption. The plaintiff did not, according to his testimony, look again to the east after he started to carry the north end of his trough around toward the south track and was struck by the car and severely injured.

The court instructed the jury that plaintiff was negligent in

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failing to see that the approaching car was running on the south track, and in placing himself in a position to be injured by such car, and submitted to the jury but one question—that is, whether the motorman on the approaching car failed to exercise reasonable care to discover plaintiff's peril and to avoid injury as soon as it was reasonably apparent that plaintiff was in danger or was going into a place of danger—and authorized a recovery by the plaintiff if it should be found that in the exercise of reasonable care after the motorman saw or might have discovered in the exercise of reasonable care that plaintiff was thus in a position of danger, he could have avoided the injury by stopping his car. In other words, the sole question submitted to the jury was one involving the application of the doctrine of the last clear chance.

It is not necessary in this case to discuss the question whether the motorman in charge of a street car is bound to look out for persons on the street in such sense that the company is liable for a failure to avoid injury to a person who has placed himself negligently in a position of danger, for the jury might have found under the evidence that the motorman did in fact see the plaintiff in a position of danger, or at least approaching a position of danger in time to have avoided injury to him. It is well settled however that the duty of the motorman on a street car to be on the lookout for persons within or approaching the zone of danger is different from that of an engineer in charge of a railway engine operated along a right of way where there is no reason to anticipate the approach of persons to the track. *Doherty v. Des Moines City Ry. Co.*, 137 Iowa, 358, 114 N. W. 183; *Barry, Adm'r, v. Burlington Ry. & L. Co.*, 119 Iowa, 62, 93 N. W. 68, 95 N. W. 229; *Doran v. Cedar Rapids & Marion City Ry. Co.*, 117 Iowa, 442, 90 N. W. 815. The court did not in this case require that the jury should find willfulness or wantonness on the part of the motorman, and we have no occasion to consider what the rule might be if there were such evidence.

The case was therefore submitted to the jury on the theory that if the motorman saw, or in the exercise of reasonable care might have seen, that the plaintiff was in a position of danger from the approaching car, or was putting himself in such position of danger without noticing the approach of the car, and while he might in the exercise of reasonable care have stopped the car before injuring the plaintiff, then the defendant was liable notwithstanding the negligence of the plaintiff in putting himself in such position of danger. The evidence justified the submission of the case on that theory, for, as already indicated, it tended to show that the motorman did see the plaintiff near the south track in such position that he was not likely to observe the approach of the car, and apparently not giving attention to such approach in time to enable the motorman to stop the car

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before it struck the plaintiff. It must have been reasonably apparent to the motorman that the object of the plaintiff in carrying the end of his trough to the east and south was to clear the north track, and as no car was in sight coming from the west, the jury may well have found that the apparent purpose of plaintiff was to pass to the south track, or so near it as to be in a position of danger from the approaching car in order to clear the north track for the supposed approach of this car coming from the east. While it is true that a motorman is not bound to anticipate that a person not already in a position of danger from the approaching car will negligently put himself in such position of danger, yet when the motorman sees that a person on the street is apparently placing himself in a position of danger without being aware of the approaching car, it is plainly his duty to take cognizance of that fact and avoid injury to him if practicable, and we have recognized the rule that under such circumstances the negligence of the person in danger, which has thus become apparent to the motorman, will not relieve the street car company from liability for the negligence of the motorman in not taking reasonable precautions to avoid an accident. *McCormick v. Ottumwa R. & L. Co.*, 124 N. W. 889. In that case it was found that under the evidence the motorman could not have reasonably anticipated that the person injured was about to go upon the track ahead of the approaching car in time to have avoided injury to him, but in *Kelley v. Chicago, B. & Q. R. Co.*, 118 Iowa, 387, 92 N. W. 45, cited with approval in the case last above referred to, and which is analogous in view of the fact that the engineer in charge of the engine saw the person who was in danger on the track negligently failing to keep any watch for the approaching engine, it was held that notwithstanding the negligence of the person on the track the railway company was liable if the engineer failed to use reasonable care in avoiding injury to him.

In view of the application of the doctrine of the last clear chance which we have thus recognized, we see no error in the submission of this case to the jury on the theory on which it was submitted. Such theory does not involve a recognition of liability in case of concurrent negligence, nor does it involve any case of comparative negligence. The motorman was bound to use reasonable care not to injure the plaintiff in the condition in which the plaintiff had placed himself, even though he was guilty of negligence in thus putting himself in a position of danger which he might have avoided by reasonable precautions. In the recent case of *Bruggeman v. Illinois Cent. R. Co.*, 123 N. W. 1007, the court was divided in opinion as to whether the doctrine of the last clear chance was applicable under the facts. The majority of the court held that in the application of that doc-

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trine it is not necessary to find that the negligence of the injured person had ceased to operate before the accident occurred, and that it was sufficient to call that doctrine into play if the defendant's employee knew of the danger in time to have avoided injury to the person in peril in the exercise of reasonable care, even though he was negligent in putting himself in a place of danger and continued to be negligent in not looking out for his own safety. The judge who dissented from this statement of the rule expressed the view that the plaintiff in such a case could invoke the doctrine of the last clear chance only on the theory that, if his intention to go into a position of danger became apparent to the engineer operating the approaching engine in time to have enabled him in the exercise of ordinary care to stop his engine, it was negligence not to do so.

The theory on which this case was tried seems to have been in accordance with the views of this court expressed in several cases, and not contrary to any views expressed in any of the cases on this subject, and, as there was sufficient evidence to support the finding of the jury for the plaintiff on this theory, we should not interfere with the judgment.

There is a further contention on the part of the appellant that the verdict of \$17,000 was so manifestly excessive as to indicate passion and prejudice requiring the setting aside of the verdict in toto, and not merely its reduction in amount. Without setting out in detail the evidence as to the extent of plaintiff's injuries, which we think under the circumstances to be wholly unnecessary, we are content to say that the trial court may well have found that the verdict was excessive, not on account of any passion or prejudice with reference to plaintiff's right to recover, but only on account of a misconception on the part of the jury as to what should be allowed under proper rules as to the measure of damages, and therefore we are not willing to hold that the court erred in allowing the verdict to stand for a reduced amount.

Finding no error in the record, the judgment is affirmed.

ILLINOIS CENT. R. CO. *v.* FLAHERTY.

(Court of Appeals of Kentucky, June 17, 1910.)

[129 S. W. Rep. 558.]

Railroads—Persons on Track—Injuries—Care Required.*—In cities and towns where the population is dense and a great many persons pass on a railroad's right of way, the railroad company is bound to operate its trains at a moderate rate of speed, and to give notice of their approach and keep a lookout, taking such precautions as circumstances require for proper security of life.

Railroads—Persons on Track—Trespassers—Injury—Negligence—Question for Jury.—In an action for injuries to a pedestrian walking at night on the side of defendant's railroad track in a city in a path largely used by pedestrians by being struck by a train approaching him from the rear, whether defendant was negligent was for the jury.

Trial—Instructions—Refusal of Requests.—It is not error to refuse a request to charge covered by instructions given.

Appeal from Circuit Court, Henderson County.

Action by Patrick Flaherty against the Illinois Central Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Trabue, Doolan & Cox, C. L. Silvey, John L. Dorsey, John C. Worsham, and Blewett Lee, for appellant.

Clay & Clay, for appellee.

CLAY, C. Appellee, Patrick Flaherty, was struck and injured by one of appellant's trains. He brought this action against appellant to recover damages for his injuries. A trial resulted in a verdict and judgment in favor of appellee for the sum of \$1,600. To reverse this judgment this appeal is prosecuted.

Appellee was employed as parkkeeper for the city of Henderson. On April 20, 1908, after he had finished his regular duties

*For the authorities in this series on the subject of the care required of those operating trains in streets to avoid collisions with other users of streets, see last foot-note of *Schwanenfeldt v. Chicago, etc., Ry. Co.* (Neb.), 29 R. R. R. 238, 52 Am. & Eng. R. Cas., N. S., 238; first foot-note of *Hollins v. New Orleans & N. W. R. Co.* (La.), 28 R. R. R. 283, 51 Am. & Eng. R. Cas., N. S., 283; first foot-note of *Holmes v. Missouri Pac. Ry. Co.* (Mo.), 27 R. R. R. 551, 50 Am. & Eng. R. Cas., N. S., 551.

For the authorities in this series on the question whether any rate of speed of a railroad train in a city or other municipality may constitute negligence where it is not limited by statute or ordinance, see foot-note of *Freedman v. New York, etc., R. Co.* (Conn.), 34 R. R. R. 121, 57 Am. & Eng. R. Cas., N. S., 121, where all those preceding it are collected.

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for the day, he went to the corner of Second and Clark streets to do some special work for a Mr. Amiet. He left there about 8:30 o'clock p. m. for the purpose of going to his home, which was located on Fifth street. In going home it was his custom to go by way of the Union Station. After passing through the Union Station, he proceeded along the granitoid walk under the train shed. This walk runs from the station proper about 200 feet. From there to where the Illinois Central track on which appellee was injured leaves the depot track the distance is about 200 feet. From that point to the place of the injury the distance is about 200 feet further. After reaching the end of the granitoid walk, appellee proceeded on the left side of the track to where it turns to go over the bridge. There he crossed over to the left side of the track. After crossing the track he stopped, looked back, and listened, and then stepped off the track and got into a path on the right-hand side of the track next to the Waller mill. While walking along the pathway near this track, he was struck by a train approaching from the rear. This train was composed of an engine and four or five cars. The engine was pushing the cars towards Fifth street. Thus the cars were between appellee and the engine. Appellee was struck by the front car. It was a dark night, and no lights were burning in the vicinity. The evidence for appellee was to the effect that no lookout was kept and no warning given of the approach of the train. The evidence for appellant is to the effect that at the time of the injury the bell on the engine was being rung, and there were two men on the front car. One of these men was not keeping a lookout, and the evidence is conflicting as to whether the other was keeping a lookout. Appellee was struck in the side of the head and knocked down. One of his feet was cut off and some of his ribs were broken.

On each side of the track on which appellee was injured is a customary pathway used by the employees of Waller's mill and the Henderson Elevator Company and by others in going to and from their homes on Fifth street. This pathway had been used for seven or eight years. In the daytime it was used by large numbers of persons. The evidence does not show that so many persons used the pathway in question after dark; but there can be no doubt of the fact that the evidence was sufficient to justify the submission of this question to the jury, especially in view of the fact that a number of appellant's employees testified, and they were not asked concerning the customary use of the pathway in question. Appellant contends that it was entitled to the exclusive use of its yards, and that appellee was simply a trespasser, to whom it owed no duty except to use ordinary care to avoid injuring him after his peril was discovered. In support of this position, appellant cites a number of cases. The doctrine of the cases relied upon has, however, been modi-

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fied by the more recent decisions of this court. In cities and towns where the population is dense, and from the number of persons passing the danger to life is great, it is the duty of those operating railroad trains to moderate the speed of the trains, to give notice of their approach, to keep a lookout, and to take such precautions as the circumstances demand for the proper security of human life. *Louisville & Nashville Railroad Co. v. McNary's Adm'r*, 128 Ky. 408, 108 S. W. 898, 32 Ky. Law Rep. 1266, 17 L. R. A. (N. S.) 224; *Illinois Central R. R. Co. v. Murphy's Adm'r*, 123 Ky. 787, 97 S. W. 729, 30 Ky. Law Rep. 93, 11 L. R. A. (N. S.) 352. Being of the opinion that the facts of this case bring it within the rule above laid down, we conclude that the court did not err in refusing appellant a peremptory instruction. Nor can we say that the finding of the jury is flagrantly against the evidence.

We deem it unnecessary to set out the instructions given by the court. They are practically the same as the instructions authorized by this court to be given in *C., N. O. & T. P. Ry. Co. v. Hill's Adm'r*, 89 S. W. 523, 28 Ky. Law Rep. 530. As the instructions given covered every phase of the case, it was not error to refuse instructions A and B, offered by appellant.

But appellant insists that it is entitled to a reversal because of the failure of the trial court to give an instruction to the effect that, if the jury believed the plaintiff was deaf or hard of hearing, then it was his duty to exercise great care and caution in the use of his remaining senses to avoid injury from defendant's train. It is very doubtful if the evidence of appellee's deafness was sufficient to authorize the giving of this instruction. Even if it was, we are inclined to the opinion that, under the facts of this case, the error, if any, was not prejudicial to the substantial rights of appellant.

Judgment affirmed.

BIRMINGHAM SOUTHERN R. CO. *v.* FOX.

(Supreme Court of Alabama, Feb. 26, 1910. Rehearing Denied June 30, 1910.)

[52 So. Rep. 889.]

Evidence—Admissibility—Res Gestæ.—In an action against a railroad for the death of plaintiff's intestate by being struck by one of defendant's engines, evidence whether the bell was rung, or the whistle blown, was admissible as part of the *res gestæ*.

Railroads—Action—Personal Injuries—Evidence—Admissibility of—Condition of Roadbed.—In an action against a railroad for the death of plaintiff's intestate by being struck by one of defendant's engines, while there was no duty on defendant to furnish decedent a good track to walk on, yet evidence as to its condition was admissible as a description of the locus in quo, as tending to show whether defendant's agents were negligent in their handling of the train, and if so, to what degree, and also whether decedent was guilty of contributory negligence.

Railroads—Action—Personal Injuries—Evidence—Admissibility of—Custom of the Public to Use a Part of the Roadbed.—In an action against a railroad for the death of plaintiff's intestate by being struck by one of defendant's engines, while evidence of a custom of the public to use the roadbed at a certain point was not admissible to show a right of the public to be there on the track, yet it was admissible on the issue of the wanton or willful negligence of defendant's agent.

Railroads—Injuries to Persons on Track—"Trespasser."*—A person walking on a railroad track is a trespasser, unless it is where the track runs along a highway or public street, which the public have an equal right to use.

Railroads—Trespassers—Liability for Injuries.†—If the engineer, conductor, or other agents in charge of a train are informed of the custom of the public to use a certain part of the roadbed, and, with such knowledge, they wantonly or willfully injure a person, the

*For the authorities in this series on the subject of the right to walk on a railroad track without necessity, see first foot-note of *Adams v. St. Louis, etc., R. Co.* (Ark.), 29 R. R. R. 733, 52 Am. & Eng. R. Cas., N. S., 733; third foot-note of *Northern Pac. Ry. Co. v. Jones* (C. C. A.), 29 R. R. R. 158, 52 Am. & Eng. R. Cas., N. S., 158.

†For the authorities in this series on the subject of the care due from those in charge of trains to trespassers upon railroad tracks after their presence in perilous situations is discovered, see second foot-note of *Miller's Adm'r v. Illinois Cent. R. Co.* (Ky.), 34 R. R. R. 396, 57 Am. & Eng. R. Cas., N. S., 396; *San Antonio, etc., Ry. Co. v. Hodges* (Tex.), 33 R. R. R. 457, 56 Am. & Eng. R. Cas., N. S., 457.

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railroad company would be liable notwithstanding the person injured was at the time a trespasser on the track.

Trial—Direction of Verdict—Evidence—Insufficiency.—Where, in an action, the evidence was sufficient to support a verdict for plaintiff as to a certain count in the complaint, the court properly refused to give a general affirmative charge for defendant as to that count.

Appeal and Error—Conclusiveness of Verdict—Sufficiency of the Evidence.—In an action against a railroad for the death of plaintiff's intestate by being struck by an engine, the Supreme Court on appeal could not pass on the weight or sufficiency of evidence tending to show wanton or willful injury by defendant's agent, incredible as the evidence may seem.

Appeal from City Court of Birmingham; H. A. Sharpe, Judge.

Action for personal injuries by Cassie Fox against the Birmingham Southern Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Percy, Benners & Burr, for appellant.

Bowman, Harsh & Beddow, for appellee.

MAYFIELD, J. Appellee's intestate was killed by a train or locomotive engine of appellant's while he was walking along its track. Intestate, on seeing the approaching train and his danger, attempted to leave the track by climbing a steep bank of ashes or coke braize, which refuse matter is left from the manufacture of coke. This matter is loose like ashes or sand, and it slipped or slid in his attempt to climb it, causing intestate to fall or roll back on the track or near enough to be struck by some part of the engine and killed.

Whether or not the bell was rung or the whistle was blown, at or about the time of the injury complained of, was a circumstance admissible in evidence, under the issues raised on the trial. Hence, there could be no error in allowing proof thereof. While the failure to do either, or both, would not alone render defendant liable, or excuse the defendant if otherwise liable, yet it was admissible, in connection with other evidence, to aid in making out plaintiff's case and probably the defendant's defense, or in rebutting it. Such evidence might have been shown to be a part of the *res gestæ*.

Evidence as to the condition of the track was also admissible, as a description of the locus in quo. While, of course, there was no duty on defendant to furnish intestate a good or safe track or right of way on which to walk, and no liability could possibly result from a failure to furnish, maintain, or keep such roadbed, track, or right of way, yet a description of the locus in quo, the scene of the accident or injury, was competent, as tending to show whether defendant's agents in charge of the

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train were guilty of negligence, and, if so, in what degree, and also whether intestate was guilty of negligence which proximately contributed to his death.

While evidence of a custom of the public to use the roadbed or track of a railroad at a certain point, as a footpath, is not admissible for the purpose of showing a right of the public to be there on the track, or to show that a person walking along the track of the railroad at such a point is not a trespasser by reason of such custom, because if a person walks along a railroad track he is a trespasser notwithstanding a custom or habit of the public to so walk along the track at such point, unless it be where the railroad is laid along a public street or highway which the public have equal right to travel or use, yet proof of such custom or habit of the public to so use a part of the railroad's track is admissible in evidence, in connection with other evidence, as tending to show wanton negligence or willful injury. That is to say, if the engineer, conductor, or other agents in charge of the train, knowing of this custom or habit of the public to so use a portion of the track, and knowing that people are constantly on the track at such point, and, with such knowledge, so operate the train as to wantonly or willfully injure persons so upon the track, the railroad company would be liable notwithstanding the person injured was at the very time a trespasser on the track.

It is true that it is said in *Glass's Case*, 94 Ala. 586, 10 South. 215, that evidence of such custom or habit is not admissible; but what the writer evidently meant was that such evidence was not admissible for the purpose of showing that a person on the track, under such conditions, was a trespasser nevertheless. That is evident from the quotation which immediately precedes it, and from what the writer says immediately thereafter, in the same opinion. Such evidence is not admissible for the purpose of showing that the person on the track is not a trespasser—for he is notwithstanding the custom or habit still a trespasser—but it is competent and admissible, in connection with other evidence, to show wanton negligence or willful injury on the part of the engineer or persons in control of the train while passing such point. *Haley's Case*, 113 Ala. 640, 21 South. 357; *Guest's Case*, 136 Ala. 348, 34 South. 968; *Webb's Case*, 97 Ala. 308, 12 South. 374; *Meador's Case*, 95 Ala. 137, 10 South. 141; *Martin's Case*, 117 Ala. 367, 23 South. 231; *Brown's Case*, 121 Ala. 221, 25 South. 609; *Lee's Case*, 92 Ala. 262, 9 South. 230; *Robbin's Case*, 124 Ala. 113, 27 South. 422, 82 Am. St. Rep. 153.

All counts of the complaint were eliminated by the general affirmative charge, except counts 1 and 5. Count 1 declared on wanton negligence, and count 5 on subsequent negligence.

There was evidence which, if believed, was sufficient to support the verdict of the jury as to the fifth count of the complaint,

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which charged subsequent negligence. It therefore follows that the court did not err in declining to give the general affirmative charge, as requested by the defendant, as to the fifth count.

There was evidence, also, from which the jury might infer wanton negligence or willful injury, on the part of the engineer, however incredible some of it may seem to the court (and we confess that some of it does so seem to us), but we cannot, on this appeal, pass upon the weight or sufficiency of such evidence.

Finding no reversible error, the judgment is affirmed.

Affirmed. All the Justices concur.

STACK v. EAST ST. LOUIS & S. RY. CO.

(Supreme Court of Illinois, June 29, 1910.)

[92 N. E. Rep. 241.]

Negligence—Contributory Negligence—Burden of Proof.*—In an action for wrongful death the burden of proof is on plaintiff to show that deceased was in the exercise of ordinary care at the time he was injured, to be determined as a fact by the circumstances attending the event.

Death—Contributory Negligence—Question of Law or Fact.—Whether evidence tends to prove that deceased was in the exercise of ordinary care at the time he was killed is a question of law which the court may determine adversely to plaintiff only when no other conclusion can reasonably be drawn from uncontradicted facts and from the evidence favorable to plaintiff.

Street Railroads—Injury to Person on Track—Care Required.†—Where decedent was killed after alighting from a car, by a car passing in the opposite direction as he was going around the end of the car from which he alighted, he was only bound to the exercise of reasonable care under all the circumstances, and was not bound "to ascertain" whether there was a car approaching on the other track from the opposite direction.

*See last foot-note of *Sontum v. Mahoning, etc., Ry. Light Co.* (Pa.), 35 R. R. R. 574, 58 Am. & Eng. R. Cas., N. S., 574; third foot-note of *Louisville, etc., R. Co. v. Engleman's Adm'r* (Ky.), 35 R. R. R. 106, 58 Am. & Eng. R. Cas., N. S., 106; last foot-note of *Evansville, etc., R. Co. v. Berndt* (Ind.), 34 R. R. R. 535, 57 Am. & Eng. R. Cas., N. S., 535; first foot-note of *Lundergan v. New York Cent., etc., R. R. Co.* (Mass.), 34 R. R. R. 344, 57 Am. & Eng. R. Cas., N. S., 344; first head-note of *Cottle v. New York, etc., R. Co.* (Conn.), 34 R. R. R. 282, 57 Am. & Eng. R. Cas., N. S., 282.

†See generally, foot-note of *Yevsack v. Lackawanna & W. V. R. Co.* (Pa.), 30 R. R. R. 332, 53 Am. & Eng. R. Cas., N. S., 332.

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Negligence—Action—Emergencies—Contributory Negligence.†—If a person is momentarily paralyzed or confused by imminent danger, and does nothing, or takes a step or two in the wrong direction and a collision results, he is not for that reason chargeable with contributory negligence.

Street Railroads—Death of Pedestrian—Contributory Negligence.—A street railroad company's negligence in running a car at a prohibited speed, in passing another car which had stopped at a crossing to discharge passengers, without warning or signal, while insufficient to relieve plaintiff's intestate, struck and killed by such car just after he alighted from the standing car, from the necessity of exercising care for his own safety, was nevertheless to be considered in determining whether deceased's conduct was such as an ordinarily prudent man might have adopted under the circumstances.

Appeal from Appellate Court, Fourth District, on Appeal from City Court of East St. Louis; W. J. N. Moyers, Judge.

Action by Julia Stack, as administratrix of John Stack, deceased, against the East St. Louis & Suburban Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Schaefer, Farmer & Kruger, for appellant.

M. V. Joyce and D. J. Sullivan, for appellee.

DUNN, J. The appellee recovered a judgment against the appellant for causing the death of her intestate, John Stack, and the judgment has been affirmed by the Appellate Court. The errors assigned question the action of the trial court in refusing to instruct the jury to find the defendant not guilty and in refusing one other instruction.

The deceased alighted from the rear platform of an interurban car going west on State street, in the city of East St. Louis, which had stopped at the west side of Sixteenth street. As he passed around the rear end of the car to go to the south side of State street he was struck and killed by an east-bound car. The negligence charged in the declaration was running the car past the standing car at a high rate of speed in excess of the rate limited by an ordinance of the city, without ringing a bell or sounding a gong, without having the car under proper control, and without having it equipped with a fender in a reasonably safe condition. There was evidence tending to prove the negligence charged, and it is not contended that the judgment of

†See third foot-note of *Erie R. Co. v. Schomer* (C. C. A.), 35 R. R. R. 303, 58 Am. & Eng. R. Cas., N. S., 303; first foot-note of *South, etc., Ry. Co. v. Crutcher* (Ky.), 35 R. R. R. 199, 58 Am. & Eng. R. Cas., N. S., 199; extensive note, 34 R. R. R. 733, 57 Am. & Eng. R. Cas., N. S., 733; last head-note of *Big Sandy & C. R. Co. v. Blankenship* (Ky.), 34 R. R. R. 213, 57 Am. & Eng. R. Cas., N. S., 213.

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the Appellate Court is not conclusive against appellant on this question. It is, however, insisted that there is no evidence in the record that the deceased was in the exercise of ordinary care for his own safety.

The burden of proof is always on the plaintiff, in actions of this character, to show that the deceased was in the exercise of ordinary care at the time he was injured, and this question is always one of fact, to be determined by the circumstances attending the event. Whether the evidence tends to prove such care is a question of law, which a court can determine adversely to the plaintiff only when no other conclusion can reasonably be drawn from uncontradicted facts and from the evidence favorable to the plaintiff. There is no rule of law which prescribes any particular act to be done or omitted by a person who finds himself in a place of danger. In the variety of circumstances which constantly arise it is impossible to announce such a rule. The only requirement of the law is that the conduct of the person involved shall be consistent with what a man of ordinary prudence would do under like circumstances. Courts can lay down no precise rule of action to be observed by a man who, passing behind a street car, finds himself suddenly confronted, without warning, by a rapidly moving car or other vehicle. If, momentarily paralyzed or confused by the imminent danger, he does nothing, or takes a step or two in the wrong direction and a collision results, it cannot be said, as a matter of law, that he acted in a manner different from that which might have been expected from a man of ordinary prudence. It is not an extremely unusual situation, and each case, as it arises, must be determined upon its own facts. There was evidence in this case that the car which struck the deceased was running at a rate of speed greatly in excess of the 10 miles an hour limited by the ordinance; that the gong was not sounded within 50 or 60 feet of the crossing where the deceased was struck; and that the east-bound car was within two or three feet of him as he came from behind the west-bound car. It was possible for him, by the exercise of a sufficiently high degree of care, to have discovered the east-bound car and not have got in its way. He had, however, a right to rely upon his sense of hearing as well as of sight, and to expect the appellant, in running its car past another car stopped for the discharge of passengers, to give warning and to observe the ordinance of the city in respect to speed. While the negligence of the appellant did not relieve the deceased from the necessity of exercising care for his own safety, it is to be considered in determining whether his conduct was such as an ordinarily prudent man might have adopted under the circumstances, and that question was properly submitted to the jury.

Complaint is made of the refusal of the court to give to the jury the following instruction which was asked on behalf of ap-

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pellant: "The court instructs the jury that if you believe, from the evidence, under the instructions of the court, that the degree of care required of the said John Stack for his own safety, as defined in these instructions, required him, before crossing said track, to look and ascertain whether the track was clear or whether a car was approaching, and if the jury believe, from the evidence, under the instructions of the court, that the said John Stack, by the exercise of such care would have looked and ascertained whether the track was clear and whether or not a car was approaching, and if the jury further believe, from the evidence, under the instructions of the court, that the said John Stack did not so look and ascertain whether the track was clear and whether or not a car was approaching, and that he was killed in consequence of his failure to so look and ascertain, if he did so fail, then the court instructs the jury to find the defendant, East St. Louis & Suburban Railway Company, not guilty."

This instruction authorized the jury to find that the degree of care required of the deceased for his own safety required him, before crossing the track, not only to look, but to ascertain whether the track was clear or a car was approaching. In other instructions the court had told the jury, in accordance with the correct rule, that it was the duty of a person about to cross a street railway track to use reasonable care to ascertain whether there was an approaching car, and that neglect to do so would preclude a recovery. This instruction, however, went beyond that proposition, and authorized the jury to find that the deceased must not only use reasonable care, but must, at his peril, ascertain the fact. Ordinary care to ascertain the fact was all that was required of the deceased, and the instruction was objectionable because it permitted the jury to find that more was required. In *Chicago City Railway Co. v. O'Donnell*, 208 Ill. 267, 70 N. E. 294, 477, the refusal of an instruction somewhat similar to that now under consideration was held erroneous. That instruction, however, submitted to the jury the question whether the deceased, if he had looked, could by the exercise of ordinary care have ascertained whether or not a car was approaching. The instruction now under consideration does not submit this question, which was necessary to be decided in determining whether the deceased had exercised due care.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

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a court question. It is true that the plaintiff did not establish affirmatively that decedent stopped to listen. But this the plaintiff was not bound to do. *Consolidated Traction Co. v. Behr*, 59 N. J. Law, 477, 37 Atl. 142. Contributory negligence is a matter of defense, and the plaintiff is not required to prove its absence, as a part of his case. *New Jersey Express Co. v. Nichols*, 33 N. J. Law, 434, 97 Am. Dec. 722, affirming 32 N. J. Law, 166. No presumption of negligence upon the part of the decedent arises in such an action as the present one from the mere occurrence of the accident. *Pennsylvania R. R. Co. v. Middleton*, 57 N. J. Law, 154, 31 Atl. 616, 51 Am. St. Rep. 597; *Durant v. Palmer*, 29 N. J. Law, 544. To justify the nonsuit, therefore, the contributory negligence of the decedent must clearly appear conclusively as a fact or by necessary exclusive inference from the plaintiff's proof. *Pennsylvania R. R. Co. v. Middleton*, 57 N. J. Law, 154, 31 Atl. 616, 51 Am. St. Rep. 597.

According to the testimony two witnesses saw the accident. Both testify in effect that when the horse reached the first track it stopped because frightened, and notwithstanding the efforts of Mr. Danskin to hold him, plunged forward, drawing decedent in front of the approaching train. One of these witnesses did not see the horse and wagon until the horse was near to or upon the south-bound track. At what point the other witness, Field, first saw the decedent's horse and wagon is a matter of doubtful inference, because his testimony with respect thereto is indefinite and conflicting. At one place he says: "He was pretty close to the track when I first saw him." At another place in his testimony he says "he (Danskin) was standing up * * * sawing on the horse, when I first saw him. The horse's head was going like this, from back to forward (illustrating) like that, when I first noticed him. Then I saw the collision." At still another place he testifies that the horse was trotting slowly, and "when I saw it first it would have been further from the west-bound track—maybe 40 or 50 feet—coming along at that rate."

In view of the presumption of due care upon the part of the decedent, we are of the opinion that this evidence left the question of his contributory negligence in doubt, and, in such case, it was for the determination of the jury. *McLean v. Erie R. Co.*, 69 N. J. Law, 57, 54 Atl. 238, affirmed 70 N. J. Law, 337, 57 Atl. 1132. The nonsuit was therefore erroneous.

This disposes of the only question argued before us, and we desire to be understood as expressing no opinion upon the liability of the New York & Long Branch Company under the evidence.

The judgment below will be reversed, and a venire de novo awarded.

ELY *v.* DETROIT UNITED RY. *et al.*

(Supreme Court of Michigan, July 14, 1910.)

[127 N. W. Rep. 259.]

Appeal and Error—Presentation of Error—Exceptions.—Where counsel for plaintiff elected to go to the jury on the death act because the court had expressed the opinion that there was no case under the survival act, counsel's exception to such ruling should be held to also apply to the previous ruling requiring an election.

Pleading—Election between Counts.—It was error to compel plaintiff to elect at the close of his case whether he would rely on the death act or on the survival act.

Death—Action for—Grounds of Action.—Where deceased was struck on the head by a trolley pole and survived from 10 minutes to half an hour, it could not be said as a matter of law that the survival act was not applicable. -

Error to Circuit Court, Wayne County; Joseph W. Donovan, Judge.

Action by Bertha Ely, as administratrix of the estate of Henry Austin, deceased, against the Detroit United Railway and the Detroit, Monroe & Toledo Short Line. Judgment in favor of plaintiff for an insufficient amount against the defendant Short Line, and plaintiff brings error. Reversed.

Argued before BIRD, C. J., and McALVAY, BROOKE, BLAIR, and STONE, JJ.

Clarence P. Milligan, for appellant.

Brennan, Donnelly & Van De Mark, for appellees.

BLAIN, J. The plaintiff's intestate in this case, Henry Austin, met his death as the result of being struck on the head by the trolley wheel and pole of an interurban car of the Detroit, Monroe & Toledo Short Line upon the back platform of which he was riding, and this case was instituted by the plaintiff as administratrix and daughter of the deceased to recover damages for his death. The declaration contained two counts; one setting up liability under the "death act," and the other alleging liability under the "survival act." The length of time which elapsed between the fatal blow and the complete extinction of life is uncertain. According to the highest estimate, about 20 minutes elapsed from the time of the injury until the car reached Rockford. At this place a physician was sent for and procured, which must have consumed some time. The physician testified: "The man was on the platform of the car when I got there, and I looked at the man, and he was breathing at that time, and

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he was alive, and blood was coming out of his mouth and some blew on my vest. The man did not live longer than a minute after I got there. I raised the man up and tried to see what his pulse was and noticed that it was nearly gone. He had a contusion on the back part of the base of the brain, five inches and a half. * * * Mr. Austin was unconscious during the time I saw him. The breathing was not a normal breathing, still he breathed so that the blood came out of his mouth on my hand." The lowest estimate of the time between the accident and taking Mr. Austin from the car at Rockford was 5 or 10 minutes. At the close of plaintiff's case the following occurred: "Mr. Brennan: I would like Mr. Milligan to elect at this time which remedy he takes. The Court: Under the ruling of the cases you should elect which remedy you seek to recover. Mr. Milligan: Of course to save the record, while your honor is going to rule against the survival act here applicable, I claim under the survival act; but, if not, I will claim under the death act. Mr. Brennan: He cannot play fast and loose; he has to elect. I think he has to make a positive statement on the record, which remedy he is going to pursue. * * * The Court: You must make your election now. Mr. Milligan: The only case—The Court: Never mind the argument, when I rule I rule. Mr. Milligan: Well, then I will rely upon the death act. Mr. Brennan: I then ask for the direction of a verdict. The Court: Why? Mr. Brennan: I would like the jury excused. (Jury excused.) The Court: Was this brought by the estate? Mr. Brennan: Yes, and any contention is under the showing in this case there is no one legally dependent upon or entitled to support from Henry Austin. The only heirs of Henry Austin were a married daughter and a son, living West, and both of them having attained their majority. Under the case of *Rouse v. Detroit United Railway*, I claim that the presence of a person legally entitled to support is not present in this case. (Argument by Mr. Brennan.) The Court: I will hear from the other side. Mr. Milligan: Your honor has ruled I have to elect my count. Now upon that proposition—The Court: After I ruled I will not hear it. I have thought of that ahead, and I have looked it up, and there is no use of taking time upon it. Mr. Milligan: Then I can have an exception to the refusal to permit me to be heard upon that. The Court: Well, you have your ruling. There would not be anything but pain and suffering for 15 minutes, and the fact is that they are not conscious of pain that way. Mr. Milligan: Your honor, I want an exception to that. (At this point Mr. Brennan consented that a verdict be directed against the Detroit, Monroe & Toledo Short Line for the amount of funeral expenses paid by the administratrix.)" A verdict was directed in accordance with defendants' motion, and plaintiff

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has brought the record to this court for review upon writ of error.

Among the errors assigned and relied upon for a reversal are the following: "The court erred in holding that recovery could not be had under the 'survival act,' so called. The court erred in holding that plaintiff's intestate did not survive within the meaning of the statutes. The court erred in holding that plaintiff must elect under which act he would go to the jury before defendant had sworn a witness or put in its case or any part of its defense. * * * The court erred in compelling plaintiff to elect his remedy under the death act. The court erred in holding that the death act alone applied to the case."

Counsel for defendant contend that plaintiff unequivocally elected to stand upon the death act, and, if not, there was no error in the rulings of the court, since the survival act does not apply to the facts shown, and there was no liability for damages under the death act. It is also claimed that no exception was taken to the ruling of the court compelling an election. It is apparent from the colloquy between court and counsel that counsel only elected to go to the jury upon the death act because the court had expressed the opinion that there was no case under the survival act, and we think the exception to the later ruling of the court should be held to apply to the previous ruling upon substantially the same subject. The ruling of the court requiring plaintiff to elect was erroneous. *Carbary v. D. U. R.*, 157 Mich. 683, 122 N. W. 367.

We are also of the opinion that it cannot be said as a matter of law, upon this record, that the survival act did not apply. This case does not fall within the principle of the case of *West v. D. U. R.*, 159 Mich. 269, 123 N. W. 1101. In that case the direct cause of death continued to operate directly upon the injured person until life was extinct. In the present case the direct cause of death did not operate continuously, but ceased with the first blow, and plaintiff survived the original injury from 10 minutes to perhaps a half hour. In our opinion, the facts disclosed by this record bring the case within the principle of *Olivier v. St. Ry. Co.*, 134 Mich. 367, 96 N. W. 434, 104 Am. St. Rep. 607.

The judgment is reversed, and a new trial granted.

GRAY v. CHICAGO, R. I. & P. R. Co.

(Supreme Court of Iowa, July 1, 1909.)

[121 N. W. Rep. 1097.]

Evidence—Conclusions of Witness.—In an action for death in a crossing accident, in which a witness testified that, sitting in her house some distance from the track, she saw successively, through three windows, deceased pass, and the first and second time he was driving slowly, but the third time he was driving at a trot, a surveyor who had measured the distance and taken observations may testify that from the last window deceased could not have been seen, after he was 55 feet from the crossing.

Railroads—Crossing Accident—Pleading—Issues.—Where a petition for death in an accident crossing alleges the omission of a whistling post as an act of negligence, and this allegation is not attacked by motion or demurrer, evidence that there was no whistling post is admissible.

Railroads—Crossing Accident—Evidence—Contributory Negligence.*—In an action for death in a crossing accident, evidence of specific instances of care which deceased used in crossing the particular crossing and other crossings, and the evidence of the care that others used in crossing, is inadmissible.

Railroads—Crossing Accident—Physical Facts—Evidence.—In an action for death in a crossing accident, evidence as to the physical facts which characterize the crossing and its immediate vicinity is competent and material.

Railroads—Crossing Accident—Care Required.—A railway company running its trains across streets and highways must operate them with due regard to the rights and the safety of the public at the points of intersection.

Railroads—Crossing Accident—Negligence—Sufficiency of Evidence.—In an action for death in a crossing accident, evidence held to sustain a finding that defendant was guilty of negligence in running its train past a dangerous crossing the way it did.

Railroads—Contributory Negligence—Crossing Accident—Presumptions.†—Where, in an action for death in a crossing accident, there

*See extensive note, 18 R. R. R. 311, 41 Am. & Eng. R. Cas., N. S., 311.

†See last foot-note of *Sontum v. Mahoning, etc., Co.* (Pa.), 35 R. R. R. 574, 58 Am. & Eng. R. Cas., N. S., 574; second foot-note of *Louisville & N. R. Co. v. Engleman's Adm'r* (Ky.), 35 R. R. R. 106, 58 Am. & Eng. R. Cas., N. S., 106; first foot-note of *Popke v. New York, etc., R. Co.* (Conn.), 34 R. R. R. 375, 57 Am. & Eng. R. Cas., N. S., 375; first head-note of *Lundergan v. New York, etc., R. Co.* (Mass.), 34 R. R. R. 344, 57 Am. & Eng. R. Cas., N. S., 344; first head-note of *Cottle v. New York, etc., R. Co.* (Conn.), 34 R. R. R. 282, 57 Am. & Eng. R. Cas., N. S., 282.

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is no evidence that any one saw him struck, and there is no direct evidence of what he did or failed to do by way of precaution as he approached the crossing, it will be presumed that the deceased, prompted by natural instinct, did exercise care in approaching and going on the crossing.

Death—Contributory Negligence—Presumptions—Question for Jury.—The presumption indulged in that deceased was in the exercise of due care, where it is shown that there is no direct evidence of what care he did use when he met his death, is a presumption of fact, and it becomes a question for the jury whether that presumption has been overcome by other proof in the case.

Trial—Argumentative Instructions.—Requested argumentative instructions are properly refused.

Trial—Instructions.—A requested instruction, the substance of which is embodied in the charge given, is properly refused.

Railroads—Crossings—Duty of Train Operatives.‡—Reasonable vigilance to know that a public crossing is clear is a duty resting on those operating railroad trains, and that vigilance must bear some reasonable proportion to the known peculiarly dangerous character of the particular crossing which they are approaching.

Appeal and Error—Review—Harmless Error—Instructions.—In an action for death in a crossing accident in which there is no direct evidence showing with what care deceased approached and entered on the crossing, an instruction applying a presumption of care on the part of the deceased, though erroneous in using the words “in the absence of living witnesses,” rather than “in the absence of direct evidence,” is not prejudicial to defendant.

Trial—Instructions—Weight of Evidence.—In an action for death in a crossing accident in which some witnesses testified that they heard a whistle, and others that they did not, an instruction that the testimony of those not hearing the whistle was positive testimony and entitled to equal weight with those witnesses testifying affirmatively is erroneous, in that it was the province of the jury to determine the relative value of the statements, and the instruction had a tendency to fix the weight of the evidence as a matter of law.

Appeal from District Court, Cedar County; W. N. Triechler, Judge.

Action at law for damages. Verdict and judgment for plaintiff, and defendant appeals. Reversed.

Carroll Wright, J. L. Parrish, and Wright, Leech & Wright, for appellant.

I. J. Hamiel, George W. Ball, and Carl Mathers, for appellee.

WEAVER, J. Plaintiff's intestate, F. M. Gray, was killed by a passing train upon a highway crossing of the defendant's rail-

‡See note at end of case.

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way. This action is brought to recover the resulting damages to his estate on the theory that defendant was negligent in failing to give the proper crossing signals, in the rate of speed at which the train was moving, in failing to use ordinary care to see the deceased or to know of his approach to the track, and in neglecting to place a whistling post or other suitable sign to indicate to the enginemen the proper place for giving the crossing signals. The answer denied generally all the allegations of the petition. At the point where the accident occurred, the course of the railroad extends from the southeast for some distance in a northwesterly direction. The highway from the north and the railway from the northwest approach each other at a somewhat acute angle. A short distance before reaching a point where these lines would intersect, the highway deflects to the southwest and crosses the railway very nearly at a right angle. To a traveler moving from the north and approaching the crossing the view of the railroad was obstructed by cuts, buildings, and trees; but the extent and completeness of such obstruction are subjects of dispute in testimony. On the morning of Apr'l 26, 1907, the deceased, driving along this route alone in an ordinary single top buggy, was struck upon the crossing by a train from the northwest. This brief outline is probably sufficient to afford an idea of the general situation and enable the reader to understand the bearing of the testimony to which we shall hereinafter refer.

1. The witness who last saw the deceased before the instant of collision appears to have been a Mrs. Duple residing in the neighborhood. Her home is located 440 feet northeast of the railway crossing and 225 feet east of the highway down which deceased was driving. From the place where Mrs. Duple was sitting in her kitchen in the northeast part of the house, a window on the north afforded a view of a short section of the highway some 600 feet or more from the crossing. Looking straight west from the same position through a smaller window, she could see another but smaller section of the highway, while, turning her eyes still farther to the left or southwest, and looking across another room opening from the kitchen and through a window on the opposite side of said room, a third section of the highway not far from the crossing came into view. According to her story she was seated at her work near the north kitchen window on the morning in question and noticed deceased as he came into her range of vision through each of the openings to which we have referred. She further testifies that at the first and second points of her observation deceased was driving slowly; but when she last saw him his team was moving at a trot. She did not see him enter upon the crossing, and did not witness the collision. As the pertinence and weight of this testimony, so far as it bears upon the question of contributory negligence, depend very largely upon the distance between the deceased where he was last seen

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and the crossing where he was struck, plaintiff took the evidence of an engineer who had made a survey of the surroundings and had tested the range of vision commanded by the several windows of the Duple residence from the point where Mrs. Duple says she was sitting at the time in question. According to this witness, to an observer so located a traveler on the highway from the north would come into view at a point 780 feet from the crossing, at 620 feet he would pass out of sight, at 410 feet he would reappear in front of the small window on the west, at 345 feet would again disappear, at 110 feet he would come in range through the window in the front room, and at 55 feet from the crossing would pass finally from sight. Error is assigned upon the admission of much of this testimony. The point made may be illustrated by the following extract from the record. Counsel for plaintiff asked the witness: "State whether or not a person sitting in the chair in the kitchen at the point pointed out to you by Mrs. Duple could see a person traveling along the highway from the point mentioned by you 55 feet east of the crossing and at the place where he had reached the crossing." The question was objected to as incompetent, immaterial, leading, suggestive, and invading the province of the jury. The objection being overruled, the witness answered: "A person could not be seen in that 55 feet from the point in the building." While the answer partakes of a conclusion, it is also a statement of fact determined or ascertained by mathematical and visual demonstration. It is one of the commonest occurrences, upon the trial of cases where witnesses have testified to observations made or objects seen from a given point, for the opposing party to call witnesses who claim to have made the test from the same point and have them testify that the things alleged to have been seen therefrom are not in fact visible. The witness in this instance stated the facts as he claims to have found them by personal observation and by measurements which he described in detail, and his statement that within certain limits a person could not be seen by an observer from a given location is clearly admissible under the recognized rule of our own cases. Quite in point, see: *State v. Kidd*, 89 Iowa, 54, 56 N. W. 263; *Brown v. Railroad Co.*, 94 Iowa, 309, 62 N. W. 737; *Trott v. Railroad Co.*, 115 Iowa, 80, 86 N. W. 33, 87 N. W. 722; *Rietveld v. Railroad Co.*, 129 Iowa, 254, 105 N. W. 515. Other objections to the testimony of the engineer fall within the same general rule, and we need not further discuss them.

2. A witness was permitted to testify that he found no whistling post for this crossing along the defendant's road. Appellant takes the position that it was under no obligation to maintain such a post, and failure in that respect could not be negligence. An instruction to this effect was asked and refused,

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though the court appears to have ignored the issue in giving the charge to the jury. We are not prepared to say that as a matter of law failure to erect and maintain a whistling post or other mark or sign to warn the trainmen of the proximity of a crossing can in no case be held a negligent omission. The fact was charged in the petition as negligence, the allegation was not challenged by motion or demurrer, and, the evidence offered having direct bearing upon the issue as joined, there was no error in its admission. We are of the opinion, however, that if the trial court concluded that, in view of the whole case, this issue ought not to be submitted to the jury, it should have expressly withdrawn it with the evidence offered in its support. We might not be disposed to reverse on this ground alone; but, a reversal being found necessary on other grounds, we mention it that the objection may be avoided on a retrial.

3. Over the objection of the defendant, plaintiff was permitted to show by several witnesses not only the general habit of the deceased with reference to his manner of making this crossing and particular incidents illustrating such habit, but was allowed to introduce testimony of particular instances of his approaching other railway crossings and of the precautions taken by him to guard against a collision. Other witnesses were also allowed to state their own personal experiences in using this crossing when deceased was not present. We think the plaintiff was permitted to go far beyond the allowable limit in these respects. We can conceive circumstances under which, in the absence of more direct testimony, the general habit or practice of a person killed at a crossing may be inquired into as far as such habits may fairly tend to explain his presence at the time and place of collision, and perhaps as having some indirect bearing upon the question of contributory negligence. *Railroad Co. v. McNeil* (Ind. App.) 66 N. E. 777; *Railroad Co. v. Clark*, 108 Ill. 113; *Stone v. Railroad Co.*, 72 N. H. 206, 55 Atl. 359; *Evans v. Railroad Co.*, 66 N. H. 194, 21 Atl. 105; *Railroad Co. v. Bailey*, 145 Ill. 159, 33 N. E. 1089. But to go into the realm of specific instances indicating care, on the one hand, or recklessness, on the other, with reference not only to this crossing, but to other crossings, and specific instances in the experience of other persons at other times and under other circumstances, is to introduce confusion into the trial and distract the attention of the court and jury to collateral issues. This question was before the court in *Dalton v. Railroad Co.*, 114 Iowa, 259, 86 N. W. 272, where the railway company, in order to show contributory negligence on the part of the deceased who was killed in driving over a crossing in the nighttime, offered evidence that on occasions he had been seen to be asleep in his buggy. We there said: "This evidence was admitted on the theory, we suppose, that it would tend to show he was asleep at the time he was struck by the

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train, or perhaps to show his habit in this respect. Such evidence was clearly inadmissible. Rarely, if ever, may previous isolated instances be shown, to prove a condition existing at the particular time in question. Evidence of this kind tenders collateral issues that the other party is not prepared or expected to meet, and is directed to points not directly in issue. Moreover, the circumstances surrounding the instances may not have been the same as those surrounding the main fact in dispute. We are not to be understood as holding that the habits of one whose conduct is in question may not be shown in certain cases; but such habits are not to be proven by the evidence that he previously did the same thing." The principle here applied is so well settled that we need not burden the discussion by further citation. The error here pointed out is both manifest and material. The testimony of the witnesses mentioned as to the physical facts which characterize this crossing and its immediate vicinity was, of course, competent and material, and to that extent there was no error in its admission.

4. Error is assigned upon the refusal of the trial court to direct a verdict for the defendant. The motion was based upon the alleged insufficiency of the evidence to show negligence in the defendant or want of contributory negligence in the plaintiff's intestate. The first ground is not pressed upon our attention with much confidence, and in our judgment it cannot be sustained. The crossing is concededly a peculiarly dangerous one for persons traveling the highway from the north. For a considerable distance one approaching it from that direction obtains no view of the railway except at a few openings where small sections of the track are disclosed, and not until he reaches within a few feet of the north rail is he able to get a clear view of an approaching southbound train. While the general rule that no rate of speed by a railway train in the open country is negligence per se, it is no less true that a railway company running its trains across streets and highways must operate them with due regard to the rights and the safety of the public at points where these avenues of travel and commerce intersect. See *Kinyon v. Railroad Co.*, 118 Iowa, 385, 92 N. W. 40, 96 Am. St. Rep. 382, and cases there cited. This duty is emphasized where the crossing is made in surroundings which obscure the view or are of such character as to render the ordinary signals less noticeable or less effective. The evidence as to the signals given in the instant case is contradictory. The preponderance of numbers among the witnesses is to the effect that the whistle was sounded a thousand feet or more from the crossing, and that the bell was rung continuously. Others who were favorably situated say that they did not hear the signals, and there is some testimony that the only whistle sounded was when the engine was only about 300 feet from the crossing. The rate of

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the train's speed was evidently very high. The fireman whose situation was on the north side of the engine was engaged in "cleaning the deck" and was keeping no lookout. These, to say nothing of other circumstances, are sufficient to uphold a finding that the company was chargeable with negligence. So far as the case made by the evidence is concerned, appellant lays principal stress on the proposition that deceased was guilty of negligence contributing to his own death. This conclusion is drawn from the circumstances testified to by Mrs. Duple and from the fact that deceased was well acquainted with the crossing and its peculiar dangerous character, and that common prudence required him to satisfy himself that the track was clear before entering the zone of danger. The court has no inclination to abrogate the rule upon which counsel strenuously insists that a railway crossing is a known place of danger, and that the sight of the iron rails across his path is a proclamation of warning to which no prudent man will fail to give heed. Nevertheless the traveler may rightfully use the highway even across a railway track. His right thereto is upheld by a guaranty no less ancient or sacred than that which assures to the railway company the right to move its trains over its own road, though as driver of the less ponderous vehicle he must yield preference to those trains in the use of the crossing. But having the right to use it save only when the danger of collision is so apparent that a reasonably prudent person would not take the risk, or when the circumstances are such that as a reasonably prudent person he should investigate and satisfy himself that the way is clear and fails to exercise that precaution, it becomes in the very nature of things a question of fact whether what he does or fails to do is consistent with exercise of reasonable care on his part. This is always a jury question, save in those exceptional cases where the facts are so clear and undisputed that all reasonable minds must reach a like conclusion thereon. We find no such situation here.

The fact that deceased was driving his horses at a trot when last seen by Mrs. Duple has little or no tendency to show that he continued to drive at that rate until he collided with the train. Counsel seem to draw the conclusion that, according to this witness, deceased was in her sight until he reached about 21 or 23 feet from the track; but this is incorrect. She claims to have seen him until just as he passed a line between her and a certain pole on the right of way near the track. That pole, according to the witnesses, stood west of the highway and 21 feet from the north rail; but, measuring from the pole to the plank crossing where deceased was struck, it was about 38 feet. Moreover, the line of observation from the position occupied by the witness to the pole was not parallel with the course of the track, but diverged therefrom over 400 feet, and it may well be that the

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deceased would pass her line of sight in the direction of the pole substantially at the distance from the crossing which is testified to by the engineer, or 55 feet. In this distance there was ample time for him to have brought his horses to a walk, or to have stopped them, or to have looked and listened for approaching trains. We cannot presume that he did not use the reasonable precautions of a normal reasonable human being, inspired by a natural love or life, and moved by the instinctive care which leads all higher orders of animal existence to avoid physical harm. Indeed, as is now well settled, there is a presumption to the contrary in the absence of direct evidence from which the jury may ascertain the truth as to the nature and extent of the care exercised by the injured person *Phinney v. Railroad Co.*, 122 Iowa, 492, 98 N. W. 358; *Dalton v. Railroad Co.*, 104 Iowa, 26, 73 N. W. 349; *Hopkinson v. Knapp*, 92 Iowa, 328, 60 N. W. 653; *Brown v. Coal Co. (Iowa)* 120 N. W. 736. And see *Lunde v. Cudahy (Iowa)* 117 N. W. 1063, and cases there cited.

The defendant's fireman did not see the deceased at all until after the accident. The engineer did not see him, but caught a glimpse of the team and buggy just at the instant of collision. From the time he left the view of Mrs. Duple no witness claims to have seen the intestate until his body was found in the ruins of the carriage, nor is there the slightest direct evidence of what he did or failed to do by way of precaution as he approached the crossing. Under similar circumstances, in the *Dalton Case*, *supra*, we said: "It cannot be questioned that, in going upon the crossing when he did, ordinary care required that deceased should have stopped, looked, and listened to know if a train was approaching. It is a recognized rule of human conduct that persons in their sober senses naturally and instinctively seek to avoid danger. Therefore it must be presumed, until the contrary appears, that the deceased, prompted by this natural instinct, did exercise care in approaching and going on that crossing. * * * Whether the circumstances are such as to overcome the presumption that deceased, prompted by the instinct of self-preservation, did exercise the care required by him, was a question for the jury." See, to the same effect: *Hendrickson v. Railroad Co.*, 49 Minn. 245, 51 N. W. 1044, 16 L. R. A. 261, 32 Am. St. Rep. 540; *Mynning v. Railroad Co.*, 64 Mich. 93, 31 N. W. 147, 8 Am. St. Rep. 804; *McBride v. Railroad Co.*, 19 Or. 64, 23 Pac. 814. The *Hendrickson Case* is not unlike the one at bar in material respects. The deceased was seen to drive in the direction of the crossing and enter upon the right of way, was seen again by the engineer just the instant before the collision; but there was an entire absence of proof whether he stopped, looked, and listened. The court there said: "A plaintiff administrator is not required in all cases of this character to prove affirmatively that his intestate looked or listened. It

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may be inferred, in view of the circumstances, that the deceased, governed by the instinct of self-preservation, did what a prudent man would ordinarily do to save his life." See, also, *Railroad Co. v. Weber*, 76 Pa. 157, 18 Am. Rep. 407, and *Schum v. Railroad Co.*, 107 Pa. 12, 52 Am. Rep. 468. If the presumption to which we have referred is ever to obtain, it would be difficult to frame a more typical case calling for its indulgence than is here presented. The fact that there are living witnesses who can testify to facts shortly before or shortly after the accident does not interfere with the application of the rule. In *Phinney v. Railroad Co.*, 122 Iowa, 492, 98 N. W. 358, the surviving witness was standing by the deceased when he fell from the car, and in *Lunde v. Cudahy* (Iowa), 117 N. W. 1063, another person was in the same room when deceased fell into the wheel pit; but as neither saw what care, if any, the deceased exercised for his own safety, it was held in such instance that the administrator was entitled to the benefit of the presumption. The presumption is, of course, one of fact, and it becomes, as we have seen, a question for the jury whether the presumption is overcome by other facts and circumstances appearing in evidence. There was no error in refusing to direct a verdict.

5. Of the instructions refused our attention is called particularly to those numbered 2, 5, 11, and 12. The second request was argumentative only and properly refused. The substance of the fifth request was embodied in the charge given by the court, and there was no error in its refusal. The eleventh and twelfth requests were, in effect, to withdraw from the jury the allegations of negligence in the defendant's engineers in operating the train and in failing to keep a proper lookout for the crossing. They were properly overruled. Reasonable vigilance to know that a public crossing is clear is a duty resting upon those operating railway-trains, and that vigilance must bear some reasonable proportion to the known peculiarly dangerous character of the particular crossing which they are approaching. In this case, as we have seen, the fireman was not on guard at his window, and the engineer was in a position from which no effective view of the crossing could be had. In this manner they swept over the crossing at a very high rate of speed. While such facts do not present a case of negligence per se, they do present a situation from which a jury may fairly find actual negligence.

6. Of the paragraphs of the charge on which errors are assigned, we may say that the seventh appears to be confused in statement, and makes the application of the presumption of care by the deceased depend on the absence of living witnesses, when, perhaps, the more exact statement would be "the absence of direct evidence;" but we think it is not prejudicially erroneous. The tenth paragraph is in the following form: "(10) If from

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the evidence in this case you find that some witnesses testified that they heard the whistle sound and the bell ring before reaching the crossing at which the injury occurred, and other witnesses having the same opportunity to hear such whistle sounded and the bell rung testified that they listened and did not hear the whistle sounded, or did not hear the bell ring, or did not hear either of them, then you are instructed that such testimony of the latter witnesses is not negative, but positive, and entitled to equal weight with the affirmative statements of the former witnesses, and that such statements created a conflict of evidence, which it is the province of the jury to determine." In so far as this paragraph instructs the jury that the testimony of the two classes of witnesses is of equal weight, it cannot be approved, because it invades the province of the jury, which alone is charged with the duty of passing upon the weight and value of the evidence offered on trial. What the court doubtless had in mind was the proposition that there is no more inherent strength or weakness in the one kind of evidence than in the other, so long as the witnesses are in possession of their faculties and have equal opportunity to see, hear, and know the truth with reference to the matter under inquiry; and, thus interpreted, the instruction would afford no good ground for reversal. As stated, however, it has a tendency to convey an incorrect idea, and impress the jury with the thought that the weight of this item of evidence is fixed or determined as a matter of law. The weight and value of such testimony, affirmative and negative, is to be determined by the jury, as in all other cases, from a consideration of the apparent credibility of the witnesses, the reasonableness of their statements, and all the other relevant facts and circumstances from which the candid mind may reach an intelligent conclusion as to the truth of the matter in dispute. This rule was violated by the instruction to which we have referred, and the appellant's exception thereto must be sustained. Some of the other instructions criticised are, perhaps, less clear and exact than they might be; but we find none involving prejudicial error.

Errors assigned but not referred to in this opinion relate to questions which are controlled by the conclusions hereinbefore announced and require no further consideration. For the reasons stated, a new trial must be awarded.

The judgment of the trial court is reversed.

Note.**CROSSINGS—LOOKOUTS FROM TRAINS—DUTY TO KEEP.**

1. General Rule, 431.
2. Degree of Care Required in Maintaining Lookout, 432.
3. Liable if Peril Could Have Been Discovered in Time by Exercise of Ordinary Care, 434.

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4. Application of Rule Requiring Lookout for Obstructions on Tracks, 436.
5. In Cities and Towns, 437.
6. Backing Locomotives or Cars in Cities and Other Populous Places, 438.
7. Backing Locomotives or Cars at Country Crossings, 441.
8. Private Crossings, 442.
9. Sufficiency of Lookout—Illustrations, 443.
10. Contributory Negligence and Negligence of Trainmen in Failing to Discover Peril, 445.

Cross-References to Preceding Authorities in This Series upon Our Main and Kindred Subjects.

Headlights—Duties and Liabilities of Railroads.—For the authorities in this series on the subject of the duties and liabilities of railroad companies with respect to the headlights of trains, see first foot-note of *Thompson v. Aberdeen, etc., R. Co. (N. Car.)*, 32 R. R. R. 95, 55 Am. & Eng. R. Cas., N. S., 95.*

Licensees and Trespassers—Care Due before Discovered on or Near Track.—For the authorities in this series on the subject of the care required of those in charge of trains or street cars to avoid collisions with licensees or trespassers, before the latter are discovered on or near tracks, see foot-note of *Chesapeake, etc., R. Co. v. Ball (Ky.)*, 35 R. R. R. 238, 58 Am. & Eng. R. Cas., N. S., 238; last foot-note of *Chesapeake, etc., R. Co. v. Corbin (Va.)*, 35 R. R. R. 229, 58 Am. & Eng. R. Cas., N. S., 229; foot-note of *Florida R. Co. v. Sturkey (Fla.)*, 34 R. R. R. 410, 57 Am. & Eng. R. Cas., N. S., 410; foot-note of *Miller v. Illinois Cent. R. Co. (Ky.)*, 34 R. R. R. 396, 57 Am. & Eng. R. Cas., N. S., 396.

Lookouts upon Trains Approaching Crossings—Duty to Maintain.—For the authorities in this series on the subject of the duty to maintain lookouts upon trains approaching crossings, see last foot-note of *Louisville, etc., R. Co. v. Engleman (Ky.)*, 35 R. R. R. 106, 58 Am. & Eng. R. Cas., N. S., 106; seventh head-note of *Bourrett v. Chicago, etc., R. Co. (Iowa)*, 34 R. R. R. 284, 57 Am. & Eng. R. Cas., N. S., 284, 121 N. W. 380; sixth head-note of *Garrison v. St. Louis, etc., R. Co. (Ark.)*, 34 R. R. R. 543, 57 Am. & Eng. R. Cas., N. S., 543.

Street Cars—Duty to Lookout in Order to Avoid Collision with Other Users of Streets.—For the authorities in this series on the subject of the duty of those in charge of street cars to lookout in order to avoid collisions with other users of streets, see last foot-note of *South, etc., R. Co. v. Crutcher (Ky.)*, 55 R. R. R. 199, 52 Am. & Eng. R. Cas., N. S., 199; first head-note of *Engvall v. Des Moines City R. Co. (Iowa)*, 35 R. R. R. 266, 58 Am. & Eng. R. Cas., N. S., 266; foot-note of *Louisville R. Co. v. Gaugh (Ky.)*, 34 R. R. R. 304, 57 Am. & Eng. R. Cas., N. S., 304.

Note

1. GENERAL RULE.

It may be stated as a general rule that ordinary care requires that a lookout shall be maintained upon a train approaching a public crossing, in order to avoid injuring other users of the crossing.

United States.—*Continental Imp. Co. v. Stead*, 95 U. S. 161, 24 L. Ed. 403.

Alabama.—*Memphis, etc., R. Co. v. Womack*, 84 Ala. 149, 4 So. 618.

Arkansas.—*St. Louis, etc., R. Co. v. Lewis*, 60 Ark. 409, 30 S. W. 765, 1135.

Connecticut.—*Sullivan v. New York, etc., R. Co.*, 73 Conn. 203.

Illinois.—*Chicago, etc., R. Co. v. Ryan*, 70 Ill. 211; *Toledo, etc., R. Co. v. Cline*, 45 Am. & Eng. R. Cas. 150, 135 Ill. 41, 25 N. E. 846, reversing 31 Ill. App. 563.

Iowa.—*Bourrett v. Chicago, etc., R. Co. (Iowa)*, 34 R. R. R. 284, 57 Am. & Eng. R. Cas., N. S., 284, 121 N. W. 380.

Kentucky.—*Louisville, etc., R. Co. v. Davis (Ky.)*, 106 S. W. 304; *Southern R. Co. v. Winchester (Ky.)*, 105 S. W. 167.

Maine.—*Garland v. Maine Cent. R. Co.*, 85 Me. 519, 27 Atl. 615; *Purinton v. Maine Cent. R. Co.*, 78 Me. 569, 7 Atl. 707.

Michigan.—*Green v. Chicago, etc., R. Co. (Mich.)*, 6 Am. & Eng. R. Cas., N. S., 317.

Missouri.—*Thompson v. Missouri, etc., R. Co.*, 93 Mo. App. 548.

New Jersey.—*Rafferty v. Erie R. Co.*, 66 N. J. L. 444, 49 Atl. 456.

North Dakota.—*Johnson v. Great Northern R. Co.*, 11 Am. & Eng. R. Cas., N. S., 76, 7 N. Dak. 284, 75 N. W. 250.

Ohio.—*Ludden v. Columbus, etc., R. Co.*, 9 Ohio Dec. 793.

Pennsylvania.—*Pittsburg, etc., R. Co. v. Dunn*, 56 Pa. 280.

Texas.—*Paris, etc., R. Co. v. Calvin (Tex. Civ. App.)*, 103 S. W. 428; *Shoemaker v. Texas, etc., R. Co.*, 29 Tex. Civ. App. 578, 69 S. W. 990.

Wisconsin.—*Heddles v. Chicago, etc., R. Co.*, 74 Wis. 239, 42 N. W. 237; *Townley v. Chicago, etc., R. Co.*, 53 Wis. 626, 11 N. W. 55.

Active Duty.—A person traveling over a highway railroad crossing at a place where the public generally is licensed to pass is not a trespasser, and the railroad owes to him the active duty of keeping a lookout for him. So held in *Bourrett v. Chicago, etc., R. Co. (Iowa)*, 34 R. R. R. 284, 57 Am. & Eng. R. Cas., N. S., 284, 121 N. W. 380.

Right to Unobstructed Track.—The law requires that a sharp lookout shall be maintained from a train approaching a crossing, although the railroad is entitled to an unobstructed track for the operation of its trains at such points. So held in *Garland v. Maine Cent. R. Co.*, 85 Me. 519, 27 Atl. 615.

Possibility of Seeing Obstruction—Check Speed.—It is the duty of those in charge of a train approaching a public crossing to look along the track, and if they see, or might see, by due care and

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caution, any obstruction on the track, to check the train by every means in their power. So held in *Pittsburg, etc., R. Co. v. Dunn*, 56 Pa. 280.

Presence to Be Anticipated.—Where trainmen have reason to anticipate the presence of persons who may be injured by the movements of the train, it is their duty to be on the alert to discover them, and if injury occurs by reason of failure to do, the railroad company is liable. So held in *Thompson v. Missouri, etc., R. Co.*, 93 Mo. App. 548.

Teams.—It is the duty of those in charge of trains to keep a sharp lookout, in order to avoid collision with teams at crossings. So held in *Purinton v. Maine Cent. R. Co.*, 78 Me. 569, 7 Atl. 707.

Absence of Crossing Safeguards—Obstructed View—Recklessness.—In *Kelly v. Duluth, etc., R. Co.*, 92 Mich. 19, 52 N. W. 81, it is held that an engineer is reckless, who, when he knows there are no semaphores, flagman, or gates at a railroad crossing, a view of which is obstructed, attempts to run his train over the crossing without seeing that the way is clear.

Arkansas Statute—Particular Duty at Crossings.—Certain statute of Arkansas requires railroads to keep a lookout upon trains to prevent injury to travelers, and this is particularly its duty at public crossings. *Louisiana, etc., R. Co. v. Ratcliffe (Ark.)*, 33 R. R. R. 255, 56 Am. & Eng. R. Cas., N. S., 255, 115 S. W. 396.

Collision with Team—"Mere Inadvertence."—But in *Georgia Pac. R. Co. v. Lee*, 92 Ala. 262, 9 So. 230, it is said in the opinion: "The failure to keep a lookout (from a train approaching a highway crossing), which it was the duty of defendant's employees to maintain, and which would have sooner disclosed the peril of the driver and plaintiff's wagon and team—even conceding that such would have been the case—was, at the most, mere negligence, inattention, inadvertence, * * *."

2. DEGREE OF CARE REQUIRED IN MAINTAINING LOOKOUT.

It is generally held that the person whose duty it is to lookout from a train approaching a crossing must exercise ordinary care to discover persons or teams on or near the track, in time to be able to avoid running the train against them.

United States.—*Continental Imp. Co. v. Stead*, 95 U. S. 161, 24 L. Ed. 403.

Arkansas.—*Louisiana, etc., R. Co. v. Ratcliffe (Ark.)*, 33 R. R. R. 255, 56 Am. & Eng. R. Cas., N. S., 255, 115 S. W. 396; *St. Louis, etc., R. Co. v. Lewis*, 60 Ark. 409, 30 S. W. 765, 1135.

Kentucky.—*Louisville, etc., R. Co. v. Taylor (Ky.)*, 27 R. R. R. 228, 50 Am. & Eng. R. Cas., N. S., 228, 104 S. W. 776; *Southern R. Co. v. Winchester (Ky.)*, 105 S. W. 167.

Maine.—*Garland v. Maine Cent. R. Co.*, 85 Me. 519, 27 Atl. 615.

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North Carolina.—*Cooper v. North Carolina R. Co. (N. C.)*, 19 R. R. 857, 42 Am. & Eng. R. Cas., N. S., 857, 52 S. E. 932.

Tennessee.—*East Tenn., etc., R. Co. v. White*, 8 Am. & Eng. R. Cas. 65, 5 Lea (Tenn.), 540.

Wisconsin.—*Hughes v. Chicago, etc., R. Co. (Wis.)*, 14 R. R. R. 787, 37 Am. & Eng. R. Cas., N. S., 787, 99 N. W. 897.

The law requires that those in charge of a train shall exercise ordinary care by maintaining a lookout for the safety of persons on crossings. So held in *Louisville, etc., R. Co. v. Taylor (Ky.)*, 27 R. R. R. 228, 50 Am. & Eng. R. Cas., N. S., 228, 104 S. W. 776.

Care of Prudent Man.—In *Continental Imp. Co. v. Stead*, 95 U. S. 161, 24 L. Ed. 403, it is said in the opinion: "Both parties (the highway traveler and the railroad company) are charged with the mutual duty of keeping a careful lookout for danger (when approaching a crossing); and the degree of diligence to be exercised on either side is such as a prudent man would exercise under the circumstances of the case in endeavoring fairly to perform his duty."

Both the railroad and highway traveler about to cross its track are charged with the mutual duty of keeping a careful lookout for danger, the degree of diligence on either side being such as a prudent man would exercise under the circumstances of the case in endeavoring to perform his duty. So held in *Cooper v. North Carolina R. Co. (N. C.)*, 19 R. R. R. 857, 42 Am. & Eng. R. Cas., N. S., 857, 52 S. E. 932.

Care Commensurate with Danger.—In *Johnson v. Great Northern R. Co.*, 11 Am. & Eng. R. Cas., N. S., 76, 7 N. Dak. 284, 75 N. W. 250, it is said in the opinion: "The law relating to the subject of the duties of railroads on approaching crossings was stated by this court in *Bishop v. Chicago, etc., R. Co.*, 4 N. Dak. 536, 62 N. W. 605, in the following language: 'It follows that the trainmen in approaching the crossing, were not at liberty to assume in advance that animals would not be upon its tracks at the crossing. On the contrary, the fact that they were approaching a crossing devolved upon the men in charge of the train the duty of keeping a special lookout to avoid a collision with persons or animals that might be lawfully upon such crossing. The care should be commensurate with the danger to be reasonably apprehended. This general rule imposes upon railroads the duty of exercising exceptional care at crossing, because upon a crossing there is greater reason than at other places to apprehend danger from collisions with persons and domestic animals.'"

The lookout upon a locomotive must be as efficient as the circumstances require. *Marcott v. Marquette, etc., R. Co.*, 47 Mich. 1, 10 N. W. 53.

In Proportion to Known Danger.—A railroad company and a highway traveler are charged with a mutual duty of keeping a careful lookout for danger, and the degree of vigilance is in proportion

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to the known danger. So held in *Southern R. Co. v. Hansbrough* (Va.), 28 R. R. R. 1, 51 Am. & Eng. R. Cas., N. S., 1, 60 S. E. 58.

Utmost Diligence.—In *Sullivan v. New York, etc., R. Co.*, 73 Conn. 203, it is held that the utmost diligence is required in looking out in order to avoid running a train against a person using a highway crossing.

Different Kinds of Crossings.—In *Ludden v. Columbus, etc., R. Co.*, 9 Ohio Dec. 793, it is held that it is the duty of an engineer in charge of a train to keep a careful lookout ahead of it for such objects or persons as may be upon the track; and that he should keep a more careful lookout when approaching road crossings than when passing through farms remote from such crossings. And he should keep a yet more careful watch when approaching street crossing. So held in *Ludden v. Columbus, etc., R. Co.*, 9 Ohio Dec. 793.

Street Crossing.—In *Missouri, etc., R. Co. v. Matherly*, 35 Tex. Civ. App. 604, 81 S. W. 589, it is held that it is negligence in trainmen to fail to use ordinary care to discover and avoid injury to one using a public street crossing.

Switch Engine—Ordinary Care.—The operatives of a switch engine must exercise ordinary care to observe travelers about to cross a highway crossing. *Louisiana, etc., R. Co. v. Ratcliffe* (Ark.), 33 R. R. R. 255, 56 Am. & Eng. R. Cas., N. S., 255, 115 S. W. 396.

Foot Caught in Defective Crossing—Failure to Look Constantly—Ordinary Intelligence and Prudence.—In *Hughes v. Chicago, etc., R. Co.* (Wis.), 14 R. R. R. 787, 37 Am. & Eng. R. Cas., N. S., 787, 99 N. W. 897, an action for personal injuries alleged to have been caused by plaintiff's getting his foot in a defective street crossing, so as to hold him until he was struck by an approaching train, the court charged it was the railroad's duty, as the train approached the crossing, to keep a careful lookout, but that failure to constantly look ahead was not necessarily negligence, and that failure to see plaintiff before he was injured did not necessarily indicate that defendant was negligent, but that, before the jury were justified in finding defendant negligent in not keeping a lookout, they must find that its trainmen failed to exercise that degree of care which men of ordinary intelligence and prudence engaged in the same employment would have exercised in similar circumstances. It was held that this instruction substantially covered the question, so that the refusal of other instructions was not error.

Same as Care Required of Traveler.—In *Toledo, etc., R. Co. v. Cline*, 45 Am. & Eng. R. Cas. 150, 135 Ill. 41, 25 N. E. 846, reversing 31 Ill. App. 563, it is held that it is as much the duty of trainmen to lookout for persons approaching a highway crossing as for such persons to see a train near at hand.

3. LIABLE IF PERIL COULD HAVE BEEN DISCOVERED IN TIME BY EXERCISE OF ORDINARY CARE

And the mere failure of the lookout to discover the peril of the highway traveler in time to avoid running the train against him will

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not prevent recovery for his death or injuries against the railroad company, if such discovery could have been made by the exercise of ordinary care by the lookout. *Louisville, etc., R. Co. v. Dick* (Ky.), 12 R. R. R. 314, 35 Am. & Eng. R. Cas., N. S., 314, 78 S. W. 914; *Chesapeake, etc., R. Co. v. Wilson* (Ky.), 27 R. R. R. 238, 50 Am. & Eng. R. Cas., N. S., 238, 102 S. W. 810; *East Tenn., etc., R. Co. v. White*, 8 Am. & Eng. R. Cas. 65, 5 Lea (Tenn.), 540; *New York, etc., R. Co. v. Kistler*, 66 Ohio 326, 4 R. R. R. 340, 27 Am. & Eng. R. Cas., N. S., 340, 64 N. E. 130.

Possibility of Seeing with Reasonable Care.—In *East Tenn., etc., R. Co. v. White*, 8 Am. & Eng. R. Cas. 65, 5 Lea (Tenn.) 540, it is held that a lookout must not only be in his place on a locomotive so as to enable him to see ahead, but must be vigilant; and a lookout who does not see what, with reasonable care and vigilance, should have been seen, is negligent.

In *Louisville, etc., R. Co. v. Dick* (Ky.), 12 R. R. R. 314, 35 Am. & Eng. R. Cas., N. S., 314, 78 S. W. 914, an action for personal injuries inflicted by a train at a crossing, it is held that an instruction that if those in charge of the train which struck plaintiff saw his peril, or by the exercise of ordinary care could have seen it, in time to have avoided the collision, and yet failed to do so, then the jury should find for plaintiff, is proper, the injury having occurred at a place where by law it was made the duty of those in charge of the train to keep a lookout for those on or about the crossing.

Chargeable with Having Seen.—Whatever a locomotive engineer, and those with him on the engine, would see while in the proper discharge of their respective duties, they are chargeable with having seen. So held in *New York, etc., R. Co. v. Kistler*, 66 Ohio 326, 4 R. R. R. 340, 27 Am. & Eng. R. Cas., N. S., 340, 64 N. E. 130.

Plaintiff Seen by Engineer Approaching Track without Looking—Instruction.—Where plaintiff's intestate was injured at a railroad crossing, and there was evidence that the engineer, by the exercise of ordinary care, could have seen her, and should have known that she was going upon the track unaware of the approach of the train in time to have avoided striking her, it was proper to instruct that defendant was liable if its engineer saw intestate approaching the track without looking for the train in time to have prevented striking her. So held in *Chesapeake, etc., R. Co. v. Wilson* (Ky.), 27 R. R. R. 238, 50 Am. & Eng. R. Cas., N. S., 238, 102 S. W. 810.

Plaintiff's Attention Directed to Another Train.—In *Crowley v. Louisville, etc., R. Co.* (Ky.), 55 S. W. 434, there was evidence tending to show that plaintiff's peril from the approach of defendant's engine to a crossing in a city, might have been discovered in time to avert the injury from the engine, if a proper lookout had been kept, that plaintiff exercised such care as may be ordinarily expected by a person under the same circumstances; and that her failure to dis-

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cover the approach of the engine was due to a mistake of vision, or to the fact that her attention was directed to a train passing on another track. It was held that it was error to give a peremptory instruction for defendant railroad.

4. APPLICATION OF RULE REQUIRING LOOKOUT FOR OBSTRUCTIONS ON TRACKS.

The duty of the engineer or fireman of a moving train to keep a lookout for obstructions on the track applies with especial force when the train is approaching a public crossing.

United States.—Baltimore, etc., R. Co. *v.* Anderson, 29 C. C. A. 235, 85 Fed. 413.

Alabama.—Ensley R. Co. *v.* Chewning, 93 Ala. 24, 29, 9 So. 458; Frazer *v.* South, etc., R. Co., 81 Ala. 185, 1 So. 85; Memphis, etc., R. Co. *v.* Womack, 84 Ala. 149, 4 So. 618; Savannah, etc., R. Co. *v.* Meadors, 95 Ala. 137, 10 So. 141.

Arkansas.—St. Louis, etc., R. Co. *v.* Lewis, 60 Ark. 409, 30 S. W. 765, 1135; St. Louis, etc., R. Co. *v.* Roberts, 56 Ark. 387, 19 S. W. 1055; St. Louis Southwestern R. Co. *v.* Russell, 62 Ark. 182, 24 S. W. 1059.

California.—Robinson *v.* Western Pac. R. Co., 48 Cal. 409, 7 Am. Ry. Rep. 244.

Connecticut.—Sullivan *v.* New York, etc., R. Co., 73 Conn. 203.

Illinois.—Chicago, etc., R. Co. *v.* Gomes, 46 Ill. App. 255.

Iowa.—Clampit *v.* Chicago, etc., R. Co., 84 Iowa 71, 50 N. W. 673.

Kansas.—Kansas Pac. R. Co. *v.* Pointer, 14 Kan. 37.

Kentucky.—Connell *v.* Chesapeake, etc., R. Co., 22 Ky. Law Rep. 501, 58 S. W. 374; Louisville, etc., R. Co. *v.* Cooper, 23 Ky. Law Rep. 1658, 65 S. W. 795.

Maine.—Purinton *v.* Maine Cent. R. Co., 78 Me. 569, 7 Atl. 707.

Michigan.—Battishill *v.* Humphreys, 64 Mich. 494, 31 N. W. 894; Cooper *v.* Lake Shore, etc., R. Co., 66 Mich. 261, 33 N. W. 306; Kelly *v.* Duluth, etc., R. Co., 92 Mich. 19, 52 N. W. 81; Marcott *v.* Marquette, etc., R. Co., 47 Mich. 1, 10 N. W. 53.

Minnesota.—Johnson *v.* St. Paul, etc., R. Co., 31 Minn. 283, 17 N. W. 622.

Missouri.—Hilz *v.* Missouri Pac. R. Co., 101 Mo. 36, 13 S. W. 946; Frick *v.* St. Louis, etc., R. Co., 75 Mo. 595, 8 Am. & Eng. R. Cas. 280; Halferty *v.* Wabash, etc., R. Co., 82 Mo. 90.

New York.—Cheney *v.* New York Cent., etc., R. Co. (N. Y.), 16 Hun. 415.

North Carolina.—Bullock *v.* Wilmington, etc., R. Co., 105 N. Car. 180, 10 S. E. 988; Bradley *v.* Ohio River, etc., R. Co., 126 N. Car. 735, 36 S. E. 181.

North Dakota.—Johnson *v.* Great Northern R. Co., 11 Am. & Eng. R. Cas., N. S., 76, 7 N. Dak. 284, 75 N. W. 250.

Ohio.—Ludden *v.* Columbus, etc., R. Co., 9 Ohio Dec. 793.

Tennessee.—Railroad Co. *v.* Walker, 11 Heisk. (Tenn.), 383; East Tenn., etc., R. Co. *v.* White, 8 Am. & Eng. R. Cas. 65, 5 Lea (Tenn.), 540.

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Texas.—Galveston City R. Co. *v.* Hewitt, 67 Tex. 473, 3 S. W. 705; Texas, etc., R. Co. *v.* Lowry, 61 Tex. 149; International, etc., R. Co. *v.* Dalwigh (Tex. Civ. App.), 48 S. W. 527.

Wisconsin.—Whalen *v.* Chicago, etc., R. Co., 75 Wis. 654, 44 N. W. 849; Townley *v.* Chicago, etc., R. Co., 53 Wis. 626, 11 N. W. 55; Heddles *v.* Chicago, etc., R. Co., 74 Wis. 239, 42 N. W. 237.

5. IN CITIES AND TOWNS.

And, of course, when a train is running in a street or other populous place, ordinary care requires that a constant lookout shall be maintained for the safety of the public.

Kentucky.—Louisville, etc., R. Co. *v.* Cooper, 23 Ky. Law Rep. 1658, 65 S. W. 795.

Minnesota.—Johnson *v.* St. Paul, etc., R. Co., 31 Minn. 283, 17 N. W. 622.

Missouri.—Frick *v.* St. Louis, etc., R. Co., 75 Mo. 595, 8 Am. & Eng. R. Cas. 280; Hilz *v.* Missouri Pac. R. Co., 101 Mo. 36, 13 S. W. 946.

New York.—Cheney *v.* New York Cent., etc., R. Co. (N. Y.), 16 Hun. 415; Wilds *v.* Hudson River R. Co., 24 N. Y. 430, reversing 33 Barb. 503.

Ohio.—Ludden *v.* Columbus, etc., R. Co., 9 Ohio Dec. 793.

Pennsylvania.—Keller *v.* Philadelphia, etc., R. Co., 214 Pa. 82, 63 Atl. 413.

Texas.—St. Louis Southwestern R. Co. *v.* Bowles, 32 Tex. Civ. App. 118, 72 S. W. 451; Texas, etc., R. Co. *v.* Lowry, 61 Tex. 149.

Washington.—Malmstrom *v.* Northern Pac. R. Co. (Wash.), 12 Am. & Eng. R. Cas., N. S., 329; Steele *v.* Northern Pac. R. Co. (Wash.), 15 Am. & Eng. R. Cas., N. S., 129.

Affirmative and Active Watchfulness.—Trainmen, when operating trains over public crossings in cities, must exercise affirmative and active watchfulness in maintaining a proper lookout for persons using the highway. So held in Hilz *v.* Missouri Pac. R. Co., 101 Mo. 36, 13 S. W. 946.

Brakeman on Forward End of Train.—Proper care requires that there should be a brakeman on the lookout at the forward end of a train being operated on a public street. So held in Johnson *v.* St. Paul; etc., R. Co., 31 Minn. 283, 17 N. W. 622.

Starting Engine Across Street.—When a train is moving in a town great watchfulness on the part of the trainmen is required. It is the duty of the engineer before starting his engine across a street, not only to give warning of his intention to start, but to look ahead and see that his train is not likely to hurt persons who are passing. Texas, etc., R. Co. *v.* Lowry, 61 Tex. 149.

Switching Cars—Brakemen Improperly Situated.—It is negligence on the part of a railroad company to switch cars on which the brakemen are so situated that they cannot see the tracks before them,

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in a populous city where many people are constantly crossing the tracks. So held in *Steele v. Northern Pac. R. Co.* (Wash.), 15 Am. & Eng. R. Cas., N. S., 129.

Coupling Cars on Crossing.—In *St. Louis Southwestern R. Co. v. Bowles*, 32 Tex. Civ. App. 118, 72 S. W. 451, it is held that to leave cars in a street so near a crossing that a coupling with them cannot be made without forcing them onto the crossing, and to make the coupling without seeing that the crossing is clear, is negligence.

Teams.—If the employees of a railroad company, when running an engine, fail to look out at a street crossing, in order to see the danger of a collision with a team, and avoid it in time, the railroad will be deemed guilty of negligence. *Wilds v. Hudson River R. Co.*, 24 N. Y. 430, reversing 33 Barb. 503.

Constant Lookout—Question for Jury—Duty of Fireman or Flagman.—In *Louisville, etc., R. Co. v. Creighton*, 106 Ky. 42, 50 S. W. 227, it is held that it is for the jury to determine whether it is negligence on the part of the engineer to run a train along a city street without being constantly on the lookout for persons coming on the track; but that the failure of the fireman or flagman to be so on the lookout is not negligence.

Gross Negligence.—In *Louisville, etc., R. Co. v. Cooper*, 23 Ky. Law Rep. 1658, 65 S. W. 795, it is held that it was proper to submit to the jury whether failure to give signals of the approach of a train to a street crossing and to keep a lookout for persons was gross negligence, authorizing punitive damages.

Crossing in City—Fifteen Miles an Hour.—In *Crowley v. Louisville, etc., R. Co.* (Ky.), 55 S. W. 434, it is held that it is gross negligence to operate a locomotive over a crossing in a city at fifteen or sixteen miles an hour without keeping a lookout in front.

6. BACKING LOCOMOTIVES OR CARS IN CITIES AND OTHER POPULOUS PLACES.

And the same duty rests upon the railroad when its cars or locomotives are being backed in streets or other populous places.

United States.—*Chicago, etc., R. Co. v. Sharp*, 11 C. C. A. 337, 63 Fed. 532.

Alabama.—*Savannah, etc., R. Co. v. Shearer*, 58 Ala. 672, 20 Am. Ry. Rep. 451.

California.—*Zipperlen v. Southern Pac. Co.*, 7 Cal. App. 206, 93 Pac. 1049; *Robinson v. Western Pac. R. Co.*, 48 Cal. 409, 7 Am. Ry. Rep. 244.

Florida.—*Florida, etc., R. Co. v. Foxworth* (Fla.), 13 Am. & Eng. R. Cas., N. S., 469.

Georgia.—*Brunswick, etc., R. Co. v. Gibson*, 97 Ga. 489, 25 S. E. 484.

Illinois.—*Illinois Cent. R. Co. v. Ebert*, 74 Ill. 399.

Indiana.—*Baltimore, etc., R. Co. v. Peterson*, 156 Ind. 364, 59 N.

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E. 1044; *Lake Shore, etc., R. Co. v. Boyts*, 16 Ind. App. 640, 45 N. E. 812.

Iowa.—*Fourrett v. Chicago, etc., R. Co. (Iowa)*, 34 R. R. R. 284, 57 Am. & Eng. R. Cas., N. S., 284, 121 N. W. 380; *Clampit v. Chicago, etc., R. Co.*, 84 Iowa, 71, 50 N. W. 673.

Kansas.—*Kansas Pac. R. Co. v. Pointer*, 14 Kan. 37.

Kentucky.—*Crowley v. Louisville, etc., R. Co. (Ky.)*, 55 S. W. 434; *Illinois Cent. R. Co. v. Hays' Adm'r (Ky.)*, 84 S. W. 338.

Michigan.—*Cooper v. Lake Shore, etc., R. Co.*, 66 Mich. 261, 33 N. W. 306.

Missouri.—*Holmes v. Missouri Pac. R. Co.*, 207 Mo. 149, 105 S. W. 624.

Virginia.—*Virginia Midland R. Co. v. White*, 84 Va. 498, 5 S. E. 573.

Across Street.—It is negligence to back a railroad train across a street without signals or lookout. *Smith v. Pere Marquette R. Co.*, 136 Mich. 224, 98 N. W. 1022.

City Street—Scope of Engineer's Duty.—It is the duty of an engineer when operating a locomotive across a city street to keep a vigilant watch for persons, not only on, but approaching the track, and it is his duty to look beyond the rails to see if any, especially a child, is approaching the track. So held in *Holmes v. Missouri Pac. R. Co.*, 207 Mo. 149, 105 S. W. 624.

Violation of Ordinance.—In *Baltimore, etc., R. Co. v. Peterson*, 156 Ind. 364, 59 N. E. 1044, it is held that it is negligence per se to fail to maintain a watchman on the rear of a backing train, as required by a city ordinance. See also *Baltimore, etc., R. Co. v. Reynolds*, 33 Ind. App. 219, 71 N. E. 250.

Coupling—Backing Section of Train across Street—Absence of Signals and Lookout—Ordinance.—In *Pittsburgh, etc., R. Co. v. McNeil (Ind. App.)*, 66 N. E. 777, it is held that where a city ordinance prohibits the running of a train backward, without ringing the bell, and without a lookout stationed on its rear end, it is negligence to back one section of a train without warning or lookout, across a street, in order to couple with another.

Darkness—Populous Place—Backing Slowly, with Little Noise, Down Side Track—Lights—Boy Injured.—In *Whalen v. Chicago, etc., R. Co.*, 75 Wis. 654, 44 N. W. 849, it appeared that in the dusk of the evening and at a place where, as the trainmen knew, people were likely to be upon the track, a freight train of about forty cars, some of which were behind the caboose, while backing slowly and with little noise down a side track, ran into and injured a boy. The lights upon the train were burning, and the conductor and brakeman were using lighted lanterns, but there was no lookout at the rear of the train to warn people of danger. It was held that, although the train was being operated in the usual manner, failure to provide such lookout was negligence.

Foot Caught between Ties on Trestle—Endeavor to Flag Train.—In *Malmstrom v. Northern Pac. R. Co. (Wash.)*, 12 Am. & Eng. R.

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Cas., N. S., 329, it is held that although plaintiff was chargeable with having assumed all the other risks attending his attempt to cross defendant's tracks at night on a trestle in a town, at a point habitually used as a crossing by the public but which plaintiff knew was unsafe, he did not assume the risk of being run into and injured by a backing train having no lookout upon the rear car, while he was on the trestle with his foot caught between ties, he and his companion having endeavored to have the train stopped when he saw it approaching from a considerable distance.

Village Street—No Crossing Flagman—Low Speed.—An instruction to the effect that it is negligence "to back a train without a brakeman at the rear end as a lookout, across the main thoroughfare of a village, when there is not a flagman at the crossing, even at a rate but little faster than a person walks," asserts a correct legal proposition. So held in Florida, etc., *R. Co. v. Foxworth* (Fla.), 13 Am. & Eng. R. Cas., N. S., 469.

Village Street—Gross Negligence.—In *Cooper v. Lake Shore, etc., R. Co.*, 66 Mich. 261, 33 N. W. 306, it is held that it is gross negligence to back a train across the main street of a village without a brakeman at the rear end as a lookout, and in readiness, in case of danger, to apply the brakes.

Defective Brake on Engine—Absence of Other Brakemen—No Crossing Flagman—Gross Negligence.—In *Kansas Pac. R. Co. v. Pointer*, 14 Kan. 37, it is held that a finding that the injury was caused by the gross negligence of the railroad will not be set aside when it appears that deceased was run over by a train consisting of an engine, tender, one baggage and two passenger cars, which was started backward over a public crossing, in a city, with the brake on the engine out of repair and useless, with no brakeman at the other brakes, with no flagman or other person at the rear of the train, or at the crossing, to warn persons of their danger, and no one on the train except three persons, who were all on the locomotive, without blowing the whistle, though with ringing of a bell, and along a track which from the locomotive could not be seen for a distance of from forty to fifty feet from the rear of the train.

Populous Places—Kicking Cars—Flying Switches—Merely Ringing Bell.—The dangerous practice of "kicking cars" or making flying switches at populous localities and near public crossings imposes upon the railroad the duty to station a lookout upon the rear of the cars, the equivalent of which is not accomplished by merely ringing the engine bell. So held in Florida, etc., *R. Co. v. Foxworth* (Fla.), 13 Am. & Eng. R. Cas., N. S., 469.

Habitual Use by Public—Night—High Speed—Boys Killed.—In *Shoemaker v. Texas, etc., R. Co.*, 29 Tex. Civ. App. 578, 69 S. W. 990, it is held that where it appears that two boys were killed by a train while on the track at night at a point that had been used as a crossing, day and night, for years by the people of the community, those in charge of the engine should have kept a lookout ahead

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when approaching such point, as a matter of ordinary care, especially when the train's speed was unusually fast.

Frequented by Children.—A railroad is bound to provide for a careful lookout in the direction in which a train is moving in places where people, and especially children, are liable to be upon the track. *Heddles v. Chicago, etc., R. Co.*, 74 Wis. 239, 42 N. W. 237; *Townley v. Chicago, etc., R. Co.*, 53 Wis. 626, 11 N. W. 55.

Night—Crossing Used as Part of Railroad Yard.—In *Reid v. Atlantic, etc., R. Co.*, 140 N. Car. 146, 52 S. E. 307, it is held that an instruction that where an engine was backing on a crossing, in the night time, it was the duty of the engineer to give sufficient warning and to keep a man with a light at the front of the engine as it was moving, so as to keep an adequate lookout; and if there was failure in this respect and an injury resulted, there would be a negligent breach of duty, is correct, and the fact that the crossing may also be used as a part of the railroad yard or that the street ran down the track for some distance, does not change the principle.

Crossing at Depot.—In *Bradley v. Ohio River, etc., R. Co.*, 126 N. Car. 735, 36 S. E. 181, it is held that there is evidence of negligence in backing cars on a crossing at a depot without giving timely signals and without keeping a reasonable lookout.

Crossing Near Depot—Night—Absence of Signals and Lights.—In *Dixon v. Southern R. Co.*, 140 N. Car. 201, 52 S. E. 673, it is held that where there was evidence to show that an engine of the defendant was backing at night towards a crossing near a depot and ran over and killed plaintiff's intestate, who was lawfully upon the track, and the engine was running without lights or giving signals and without any one stationed so as to keep a proper lookout, the railroad was liable.

Custom Not to Keep Lookout, Effect of Knowledge of.—The fact that a person struck and injured by a backing train on a public crossing knew that it was not the custom of the company to keep a lookout on the rear end of a train backing over a crossing does not affect the railroad's negligence in failing to keep a person on the lookout under such circumstances. So held in *Galveston, etc., R. Co. v. Eitzen* (Tex. Civ. App.), 39 S. W. 625.

7. BACKING LOCOMOTIVES OR CARS AT COUNTRY CROSSING.

Whether a lookout is required upon a car or locomotive being backed at a highway crossing in the country depends upon circumstances, and one must be kept if required by ordinary care. *St. Louis, etc., R. Co. v. Denty*, 63 Ark. 177, 37 S. W. 719; *Downing v. Morgan, etc., Co. (La.)*, 20 Am. & Eng. R. Cas., N. S., 412; *Smith v. Pere Marquette R. Co.*, 136 Mich. 224, 98 N. W. 1022; *Bradley v. Ohio River, etc., R. Co.*, 126 N. Car. 735, 36 S. E. 181; *Dixon v. Southern R. Co.*, 140 N. Car. 201, 52 S. E. 673; *Reid v. Atlantic, etc., R. Co.*, 140 N. Car. 146, 52 S. E. 307; *Cookson v. Pittsburgh, etc.,*

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R. Co. (Pa.), 6 Am. & Eng. R. Cas., N. S., 339; *Duame v. Chicago, etc.*, R. Co., 72 Wis. 523, 40 N. W. 394.

Train Backing over Crossing after Passing.—Where a train has just passed a crossing, and has passed on in such a manner as to induce the belief that it is to continue on in that direction, if it is to be immediately backed down over the crossing again, it is the duty of the railroad company to have some one on the lookout in a position to prevent persons from attempting to pass over the crossing in the mean time, or to signal the train to stop if there is danger of a collision. So held in *Duame v. Chicago, etc.*, R. Co., 72 Wis. 523, 40 N. W. 394.

Same.—In *Cookson v. Pittsburgh, etc.*, R. Co. (Pa.), 6 Am. & Eng. R. Cas., N. S., 339, it appeared that a train ran past a crossing after detaching three cars on a siding by a flying switch, and then backed over the crossing again, with no brakeman at the rear, and no warning except the ringing of the bell at the other end of the train, and struck and killed a person driving over the crossing. It was held that railroad was negligent.

Particular Circumstances May Require Lookout.—It is not ordinarily negligence to neglect to have a lookout at the rear of a car being backed across a public way, though the circumstances of a particular case may be such that the absence of such a lookout may be evidence of negligence. So held in *Barnum v. Grand Trunk, etc.*, R. Co., 148 Mich. 370, 111 N. W. 1036.

Village Street—Another Train Passing—Man Killed.—In *Downing v. Morgan, etc.*, R. Co. (La.), 20 Am. & Eng. R. Cas., N. S., 412, it is held that where a working train backs down upon a rarely-used side track, towards a point in a village street, simultaneously with the passing of a freight train through the same street along a parallel track, the trainmen on the working train are bound to know of the probability of there being persons detained at or near the side track, or in the vicinity of the crossing, by reason of the passing of the train on the main track, of the danger of their passing with their attention directed to that train, etc., and, therefore, the trainmen should be specially careful to guard against dangers arising from this special situation; and if they back the train down to the crossing without giving warnings properly called for by this situation, and in so doing run over and kill a man standing at or near the crossing, whom they were almost forcedly called upon to see if they had been looking in front of them, the railroad is liable.

8. PRIVATE CROSSINGS.

It may be stated as a general rule, that the engineer of a train is not required, in the exercise of ordinary care, to keep an especial lookout in order to avoid injuring persons using a private crossing. *Rutherford v. Iowa Cent. R. Co.* (Iowa), 32 R. R. R. 647, 55 Am. & Eng. R. Cas., N. S., 647, 121 N. W. 703.

Farm Grade Crossing.—Railroad is not required to keep a lookout

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for a landowner on the track at a private farm grade crossing. *Rutherford v. Iowa Cent. R. Co.* (Iowa), 32 R. R. R. 647, 55 Am. & Eng. R. Cas., N. S., 647, 121 N. W. 703.

Crossing Maintained by Railroad—Ordinary Care Required.—But in *San Antonio, etc., R. Co. v. Mertink* (Tex. Civ. App.), 102 S. W. 153, it is held that where decedent attempted to cross a railway track at a crossing maintained by the railroad for her convenience and that of others residing on the premises through which the track extended, the company owed her the duty to exercise ordinary care in operating its train in approaching the crossing, and to keep a lookout to discover her presence at the crossing.

Train Slowly Backed—Child Killed—Question for Jury.—In *Green v. Chicago, etc., R. Co.* (Mich.), 6 Am. & Eng. R. Cas., N. S., 317, it appeared that a child was run over and killed at a frequently traveled private crossing by a train which was being slowly backed, and had no lookout at the rear. It was held that the question of the negligence of the railroad in the management of its train was for the jury.

Collision with Hay Press—Engineer's Testimony—Question for Jury.—In *Jones v. Probasco*, 18 Tex. Civ. App. 699, 45 S. W. 1036, it is held that it is not necessarily negligence for an engineer to fail to stop his train before reaching a hay press on the track, at a private crossing, in the country, which the owner has been unable to get off the track, where the engineer testified that he did not see that it was on the track and could not have seen it by the use of ordinary care, and had no reason to believe that any obstruction was on the track, and the question of his negligence was for the jury.

9. SUFFICIENCY OF LOOKOUT—ILLUSTRATIONS.

Entire Width of Crossing until Train Has Passed over.—In *Bourrett v. Chicago, etc., R. Co.* (Iowa), 34 R. R. R. 284, 57 Am. & Eng. R. Cas., N. S., 284, 121 N. W. 380, it is held that a railroad company must keep a lookout for pedestrians using a railroad crossing, throughout the entire width of the crossing and until the train has passed over it.

Street Crossing—Backing Train—Absolute Duty to Be on Rear Car.—In *Mobile, etc., R. Co. v. Coerver* (C. C. A.), 112 Fed. 489, it appeared that deceased was killed while driving across a railroad track at a street crossing by a freight train backing against his team. Evidence was conflicting as to whether the brakeman was on the rear car, or on the car next to it and just stepping onto the rear car, when deceased was first seen. The court instructed that it was the absolute duty of the railroad company to have a brakeman on the rear car, that, if there was no brakeman stationed on such car, defendant was guilty of negligence. It was held that the instruction was erroneous, as making defendant liable as a matter of law if the brakeman was not on the rear car.

Note

Curve in Track—Lookout on One Side Only.—In *St. Louis, etc., R. Co. v. Tomlinson*, 78 Ark. 251, 94 S. W. 804, it is held that where, on account of a curve in the track, it was necessary for a lookout to be kept on both sides of the track, negligence on the part of the railroad is not disproved by showing that a lookout was kept on one side.

Village Crossing—Failure of Fireman to Lookout on His Side—Child Injured.—In *St. Louis, etc., R. Co. v. Denty*, 63 Ark. 177, 37 S. W. 719, it is held that a railroad company cannot be said, as a matter of law, to be free from negligence where its fireman neglected to keep a lookout on his side of the track at a village crossing, and a small child, while standing near the track, broke away from its grandmother and ran nearly across the track before being struck by the train. In this case it is said in the opinion: "It is no excuse for this failure (to see the child in time) to say that Mrs. Reily and the child were on the side next to the fireman and that he was putting coal in the engine. The train was running at a high rate of speed over a crossing in a village, and ordinary care required that the fireman or some other employee should have kept a lookout along the track, so that the persons about to approach the track from that side could be seen. *St. Louis Southwestern R. Co. v. Russell*, 62 Ark. 182, 24 S. W. 1059; *St. Louis, etc., R. Co. v. Lewis*, 60 Ark. 409, 416, 30 S. W. 765, 1135."

Engineer's View Obstructed—Necessity of Firing Engine.—In *Louisville, etc., R. Co. v. Gilmore's Adm'r (Ky.)*, 33 R. R. R. 254, 56 Am. & Eng. R. Cas., N. S., 254, 114 S. W. 752, reversing 30 R. R. R. 412, 53 Am. & Eng. R. Cas., N. S., 412, 119 S. W. 32, it is held that a railroad company charged with the duty of keeping a lookout for pedestrians using a highway across a track cannot discharge that duty otherwise than by keeping a lookout, and the fact that it became necessary to fire the engine at a time when the engineer could not see on account of a curve in the track would not excuse the failure to do so.

Engineer's View Obstructed by Light from Furnace Fire.—Where it appears that the engineer could see by the headlight to distinguish objects three hundred feet ahead of his train, but that the furnace door was open and the light from the fire was shining in such a way that the engineer could not see well ahead does not excuse the railroad for the engineer's failure to see a person at a public crossing in time to avoid running the engine against him. So held in *Lake Shore, etc., R. Co. v. Schade*, 8 Ohio Cir. Dec. 316.

"Hooking" Fire When Emerging from Cut.—But in *Brammer's Adm'r v. Norfolk, etc., R. Co. (Va.)*, 18 R. R. R. 497, 41 Am. & Eng. R. Cas., N. S., 497, 51 S. E. 211, 104 Va. 50, it is held that the act of a railroad fireman in "hooking" his fire as the engine emerged from a cut and approached a crossing, which act was in the regular line of his duty, and temporarily prevented him from viewing the crossing, was not negligence.

Note

Engineer's View Obstructed—Fireman Busy.—And in *O'Brien Lumber Co. v. Wisconsin Cent. R. Co.*, 9 R. R. R. 462, 32 Am. & Eng. R. Cas., N. S., 462, 96 N. W. 424, 119 Wis. 7, it is held that where, in an action for death at a railroad crossing, the engineer was on the lookout on his side of the train all the time as they approached the crossing, but by reason of a curve at that point, could not see deceased, the mere fact that the fireman, in pursuance of his duties, got down on his side of the engine to the deck where he could not look ahead, did not constitute negligence on the part of the company.

10. CONTRIBUTORY NEGLIGENCE AND NEGLIGENCE OF TRAINMEN IN FAILING TO DISCOVER PERIL.

The negligence of the highway traveler in approaching or attempting to cross the railroad tracks without using proper precautions to avoid being injured by a train will not prevent a recovery against the railroad company for his injuries or death, if his peril from the train might have been discovered in time by the exercise of ordinary care by the person whose duty it was to lookout from the train. *Baltimore, etc., R. Co. v. Anderson* (C. C. A.), 10 Am. & Eng. R. Cas., N. S., 497; *Crowley v. Louisville, etc., R. Co.* (Ky.), 55 S. W. 434; *Kelley v. Hannibal, etc., R. Co.*, 75 Mo. 138, 13 Am. & Eng. R. Cas. 638; *Lake Shore, etc., R. Co. v. Schade*, 8 Ohio Cir. Dec. 316.

Possibility of Discovering Plaintiff's Peril.—In *Crowley v. Louisville, etc., R. Co.* (Ky.), 55 S. W. 434, it is held that contributory negligence in going on a railroad track at a crossing in a city will not prevent recovery against the railroad for injuries inflicted by an engine, if plaintiff's peril was discovered by the trainmen, or might, by the exercise of ordinary care, have been discovered by them, in time to prevent collision.

The negligence of a pedestrian in using railroad tracks as a crossing of an intersecting street while a train is approaching from a short distance will not excuse the company if he were seen, or would have been seen had there been a lookout on the engine, in time to avoid injuring him. So held in *Baltimore, etc., R. Co. v. Anderson* (C. C. A.), 10 Am. & Eng. R. Cas., N. S., 497.

Same—High Speed.—The railroad is liable if an engineer, running his engine at a high rate of speed, could have saved a person who was on the track at a public road crossing, even though such person was there by his own negligence, not only from the time when the engineer actually saw such person, but from the time when, by the exercise of ordinary care, he could or should have seen him. So held in *Lake Shore, etc., R. Co. v. Schade*, 8 Ohio Cir. Dec. 316.

Gross Contributory Negligence.—If the negligence of a person, in attempting to cross a railroad track without having exercised proper care to discover if a train was approaching, occurred before the negligence of the trainmen, which contributed directly to the accident, and the latter occurred after the party injured was, or by the exercise of proper care, might have been discovered on the track by the

Alabama Great Southern R. Co. v. Norris

trainmen in time to prevent the collision, the railroad is liable, however gross the negligence of the injured person may have been in placing himself in danger. So held in *Kelley v. Hannibal, etc., R. Co.*, 75 Mo. 138, 13 Am. & Eng. R. Cas. 638.

Absence of Lookout after Boy Seized Car.—In *Bourrett v. Chicago, etc., R. Co.* (Iowa), 34 R. R. R. 284, 57 Am. & Eng. R. Cas., N. S., 284, 121 N. W. 380, it appeared that a boy nearly 16 years old ran to get a ball, which had passed over the fence of a ball park and onto defendant railroad's switching tracks. A train was backed without any signals and without stationing an employee on its rear to keep a lookout. The boy, to save himself, grabbed an iron on one of the cars and held on until it had moved some distance, when he fell off and was injured. It was held that the boy's negligence did not interrupt the duty of the railroad to keep a lookout for those who might be on the track in the act of crossing on a street crossing, and the negligence of the boy did not excuse the railroad for its failure to maintain a proper lookout after the boy seized the car and was being dragged by it.

A. R. Y.

ALABAMA GREAT SOUTHERN R. CO. v. NORRIS.

(Supreme Court of Alabama, Feb. 10, 1910. Rehearing Denied June 30, 1910.)

[52 So. Rep. 891.]

Action—Forms of Action—"Assumpsit"—"Case."—The distinction between "assumpsit" and "case" is that the one is a breach of a contract, and the other a breach of a duty growing out of a contract express or implied.

Pleading—Amendment.—Where, in an action by a shipper against a carrier for delivering the goods in a damaged condition, counts of the complaint were amended by adding to each after the wrong complained of "in breach of defendant's contract with plaintiff" the amended counts were thereby changed into counts in assumpsit.

Carriers—Bill of Lading.—A bill of lading is of a dual character and effect; one is that of a receipt, and the other, that of a contract.

Evidence—Parol Evidence—Bill of Lading.*—A bill of lading as a receipt is open to explanation or modification by parol evidence.

Evidence—Parol Evidence—Bill of Lading.*—A bill of lading as a contract must be construed according to its terms, and in the absence of fraud or mistake it is presumed that all oral negotiations respecting its terms and conditions are merged therein—that it forms

*See extensive note 34 R. R. R. 637, 57 Am. & Eng. R. Cas., N. S., 637; first head-note of *Peele & Copeland v. Atlantic Coast Line R. Co.* (N. Car.), 33 R. R. R. 153, 56 Am. & Eng. R. Cas., N. S., 153.

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the final and sole receptacle of the evidence, and of the agreement between the parties, as to the reception, rate, route, etc.

Carriers—Contract of Shipment.—A contract of shipment need not be in writing.

Evidence—Parol Evidence.—In an action by a shipper against a carrier for delivery of the goods in a damaged condition, where the evidence was that the damage was caused by the negligence of defendant in reloading the goods into the car of the terminal carrier, evidence of the plaintiff that the agent of the defendant agreed with her that the goods should not be reloaded, but should be shipped on through, in the same car, was not inadmissible as modifying the contract of shipment; the bill of lading being silent in such respect.

Mayfield and Evans, JJ., dissenting.

Appeal from Tuscaloosa County Court; H. B. Foster, Judge.

Action by G. C. Norris against the Alabama Great Southern Railroad Company. Judgment in favor of plaintiff. Defendant appeals. Affirmed.

A. G. & E. D. Smith, for appellant.

Henry A. Jones, for appellee.

MAYFIELD, J. This was an action by appellee, a shipper of freight, against the appellant, a common carrier of goods, to recover damages for failure to deliver, and for delivering in a damaged condition, a lot of household goods shipped from Ensley, Ala., to Kellermann, Ala. The appellant was the initial carrier who undertook the contract of shipment, carried the goods from Ensley to Tuscaloosa, and there delivered them to the Mobile & Ohio Railroad Company, another common carrier; which latter company delivered the goods to the shipper, who was the owner and consignee as well as consignor. The goods were in good condition when received by the initial carrier, and were damaged when delivered by the delivering carrier at Kellermann, their destination. As to this the evidence may be said to be without dispute.

The goods were transferred from the car of the initial carrier, at Tuscaloosa, to that of the delivering carrier, by the agents of the initial carrier, thus being reloaded by it at Tuscaloosa. The real contest in the case was whether the goods were properly or negligently reloaded by defendant at Tuscaloosa, and whether the injury to the goods proximately resulted from the manner of this reloading. We do not say that this was the only disputed issue, but that it was clearly the main one. The bill of lading contained the usual clause or stipulation limiting the liability of each connecting carrier to damages for injury, loss, etc., "occurring on its portion of the route."

The complaint contained 16 counts, to each of which many pleas were interposed, and to many of which special replica-

Alabama Great Southern

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trainmen in time to prevent the collision. It is never gross the negligence of the defendant in placing himself in danger. So *Mo. 138, 13 Am. & En.*

exposed to each and every application, sometimes both ways, re-

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etc., *R. Co. (Iowa), 34 R.*

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13, 14, 15, and 16—as originally

considered by the trial court as counts in

and this is borne out by the sustaining of

errors to these counts, because of misjoinder.

When amended each of these counts by adding,

the phrase, "in breach of defend-

plaintiff."

complaint as thus amended the defendant again in-

its demurrers, which overruled. This, in the opinion

writer, was error under our decisions and under our

as they existed at the time of this trial. These 6 counts

amended were in case—as much so as before they were

amended. The gravamen of each was negligence, and it was not

transformed into a count in assumpsit by the allegation that

these negligent acts were in breach of a contract. While the

definition of "assumpsit" and "case," or, rather (more ac-

curately speaking), the distinction between the two actions, is

that the one is a breach of a contract, and the other a breach

of a duty growing out of a contract, expressed or implied, yet

a count cannot be changed from one to the other, by adding that

the acts complained of were in breach of a contract, or in breach

of a duty growing out of the contract. This is a mere conclu-

sion of the pleader; whether the facts averred constitute the

one or the other is a conclusion of law to be determined by the

court from the facts well pleaded. To say that the facts averred

were in breach of a contract, or in breach of a duty growing out

of the contract, is no more than to say that "this count is in as-

sumpsit," or "this count is in case." Thus denominating the

one or the other does not really make it so, if in fact and in law

it is not so. Whether it is the one or the other depends upon

the facts averred, and not upon the conclusion of the pleader—

what he calls or denominates it. If the count in question is,

without the allegation, one in assumpsit, for the pleader to say

this is in case would not make it so.

The court, therefore, in the opinion of the writer, erred in overruling the demurrers to these counts as amended. But the majority of this court are of the opinion that the demurrers were properly overruled; that there was no misjoinder; that all the counts were in assumpsit.

A bill of lading is of a dual character and effect; one is that of a receipt, and the other, that of a contract. As a receipt,

Alabama Great Southern R. Co. v. Norris

is open to explanation or modification by contract it like other contracts must be its terms, and in the absence of fraud that all oral negotiations respecting merged therein—that it forms the evidence, and of the agreement, to the reception, rate, route, etc., L. & Gnam, 91 Ala. 555, 8 South. 803; McTyer v. 487; Wayland v. Mosely, 5 Ala. 430, 39 Am. Tallassee, etc., Co. v. Western Ry. Co., 128 Ala. 167, uth. 203.

A contract of shipment need not be in writing—it can as well be oral—but if it is in writing the same law and the same rules of construction and proof apply to it as to other written contracts. And although a bill of lading is issued by the carrier, it may of course be shown that this was not the contract of shipment, but that the shipment was under another and different contract, whether oral or in writing. Authorities supra; Elliott on Railroads, § 1415 et seq.

The writer is of the opinion that the evidence of the plaintiff that the agent of the defendant agreed with her that the goods should not be reloaded, but should be shipped on through in the same car, and that the best way to make the shipment was to charter a car, whereupon the goods would be shipped clear through in that car, etc., was in violation of this rule and law of evidence; that it was clearly an attempt to modify the terms of the written contract—to insert therein conditions not originally therein contained, and to counteract some of the conditions that were expressed in the contract; and that the trial court should not have allowed this evidence. The majority of the court, however, are of the opinion that this evidence was not in violation of the rules of law and of evidence above announced, and that it was not error to admit it, for the reason that the bill of lading was silent as to the manner of loading and reloading, and as to whether the shipment was to be by carload lot or otherwise.

We have examined all the other assignments of error insisted upon, and therein find no ground of error.

It results that the judgment of the county court must be affirmed.

Affirmed.

DOWDELL, C. J., and SIMPSON, ANDERSON, McCLELLAN, and SAYRE, JJ., concur. MAYFIELD and EVANS, JJ., dissent.

BURROWES *v.* CHICAGO, B. & Q. R. Co.

(Supreme Court of Nebraska, June 10, 1910.)

[126 N. W. Rep. 1084.]

Courts—Decisions—Opinion—Discussion of Evidence.—In considering an assignment that the judgment of the lower court is not sustained by the evidence, an appellate court is not required to set out and discuss the evidence in extenso. It is sufficient if the opinion fairly reflects the evidence material to a decision upon such assignment.

Carriers—Shipment of Goods—Liability of Carrier.*—When a shipper surrenders the entire custody of his goods to a common carrier for immediate transportation, and the carrier so accepts them, the liability of the carrier as a practical insurer of the safe delivery of the goods at once attaches; but such liability does not attach until the goods are unconditionally surrendered by the shipper and accepted by the carrier.

Review.—Our former opinion adhered to.

(Syllabus by the Court.)

On application for rehearing. Denied.

For former opinion, see 85 Neb. 497, 123 N. W. 1028.

FAWCETT, J. A reargument was allowed upon a motion for a rehearing. Counsel for plaintiff vigorously assails our former opinion (85 Neb. 497, 123 N. W. 1028) upon the ground that "the opinion does not reveal the facts." This is a serious charge, but a careful re-examination of the record shows it to be without foundation. That the opinion does not mention and discuss all of the testimony will be conceded in any case, but the opinion in the case at bar fairly reflects all of the material evidence in the record. This was sufficient. The gravamen of counsel's complaint is that the opinion does not show that all of the goods which were to go as freight had been loaded, and that the goods yet to be loaded were such as were to go as baggage. The fact, even if it had been undisputed (which is not the case), that all of plaintiff's property which was to go as freight had been loaded, and that only such as was to go as baggage remained to be loaded, is immaterial, for the reason that, under plaintiff's arrangement with defendant's agent, it was all to be loaded by plaintiff in the same car—the one which had been switched onto the side track for plaintiff's accommodation. It was entirely at plaintiff's pleasure when he would load it. The only require-

*See first foot-note of *Chesapeake & O. Ry. Co. v. Hall* (Ky.), 34 R. R. R. 468, 57 Am. & Eng. R. Cas., N. S., 468; last foot-note of *Pittsburg, etc., Ry. Co. v. Chicago* (Ill.), 35 R. R. R. 380, 58 Am. & Eng. R. Cas., N. S., 380.

Burrowes v. Chicago, etc., R. Co

ment was that, if he desired to have the car attached to the passenger train which was to leave the station at 9:30 on Monday morning, he must have the loading completed before that time. The defendant was accommodating him in setting apart for his use a freight car and in agreeing to attach such freight car to its passenger train. No trains pass through Loup City on Sunday. It is apparent that the agent of the defendant was not required to be at the station on Sunday. He left town in the forenoon, having previously advised plaintiff that he was going to do so. On the evening before, he had the engine of a passing freight train switch the freight car onto a side track, and on Sunday morning, before leaving town, advised plaintiff, through one of plaintiff's employees, as to the location of the car. During the afternoon of Sunday, plaintiff and his men, with the aid of a drayman, loaded a portion of his stuff, keeping out the sleeping tents and cook tent, the gasoline cook stove and cooking utensils, and certain bedding for use that night, intending to load them into the car before train time next morning. No report was made to the agent of what had been done. Plaintiff was unable to even state whether or not the car door had been closed. The drayman, it is true, testified that he helped to push the door shut when they got the stuff in Sunday afternoon; but it was not locked, or sealed, or precautions of any kind taken to guard the car against tramps, thieves, or other evilly disposed persons—a condition which, as shown by the testimony of defendant's agent, would not have been permitted to exist had delivery been made. About 5 o'clock the next morning, before plaintiff was awake, the car took fire and was burned. No arrangements had been made for tickets, no money had been paid to the company, the agent had no knowledge that anything was in the car, no weights had been furnished defendant's agent by plaintiff, nor any waybill made out, nor anything done which would indicate even an attempt at delivery of the stuff that had been loaded to the defendant company. The car was not yet ready for shipment. It was not under the control of defendant. Defendant would have had no right, at the time of the fire, to have coupled onto the car and hauled it to its proposed destination. Plaintiff still had the right, if he saw fit, to remove all his stuff from the car the next morning and decline to ship at all, or he might decide not to go on the early train, but to wait for the next and later train. The case is not like one where freight is delivered to a railroad company, or loaded upon a railroad company's depot platform, for immediate shipment. If such had been the case here, clearly the defendant would have been liable; but we do not see how it can be said that plaintiff's goods had been delivered to the company for immediate shipment until they had all been loaded and the company notified of the fact. Both of these important elements are wanting. The

Burrowes v. Chicago, etc., R. Co

writer has very serious doubts as to whether even the liability of a warehouseman attached to defendant by what had been done by plaintiff at the time of the fire, but, be that as it may, it is clear that no liability as a common carrier had yet attached.

Counsel for plaintiff refers to *Chicago, B. & Q. R. Co. v. Powers*, 73 Neb. 816, 103 N. W. 678, cited in our former opinion, and says that he is satisfied with the law therein announced. In that opinion the court, speaking through Mr. Commissioner Oldham, said: "It is also clearly shown that the owners of the cattle intended to take the stock out of the pens in the morning, to feed, water, and range them until about 10 o'clock. We think the rule well established that, when a shipper surrenders the entire custody of his goods to a common carrier for immediate transportation, and the carrier so accepts them, the liability of the carrier as a practical insurer of the safe delivery of the goods at once attaches. *Kansas City, P. & G. R. Co. v. Barnett*, 69 Ark. 150, 61 S. W. 919. But we think it equally well settled that such liability does not attach until the goods are unconditionally surrendered by the shipper and accepted by the carrier." We think that decision decisive of the case at bar. There had not been an unconditional surrender by the shipper and an acceptance by the carrier in the present case. Hence, under the rule there announced, no liability had attached. Then, again, we are unable to see any difference between an arrangement by which one shipper is privileged to take stock out of the pens in the morning, for any purpose, prior to shipment, and an arrangement that another shipper is to have the right to keep out part of his shipment until the next morning before loading. There could not, in the very nature of the case, be an unconditional surrender until the final loading in either case, and final delivery to the carrier.

Our former judgment is clearly right, and is adhered to.

Rehearing denied.

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of the fact. Both of these important elements are wanting. The

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to be transported to Lansing, this state; that defendant failed in its duty as a common carrier, and in its contract obligations to plaintiff, in that from the time of the undertaking to transport said cattle it failed to exercise the diligence required by law to protect the same from injury by exposure and freezing, and so that, when Lansing was reached, several of the cattle were found frozen to death, and the others were more or less injured from the exposure and freezing; that at all times defendant had notice and knowledge respecting the condition of the cattle, and the injuries being inflicted thereto, notwithstanding which it took no steps to relieve the same from the danger to which they were exposed. It is specifically alleged that after receipt of the cattle at St. Paul, the defendant transported the car to Newport, a station a few miles distant, where the car was left "standing on a side track, in an unsheltered and exposed position, for a period of several hours, and until said cattle became badly frozen;" that this was against the protest of plaintiff, and against his demand "that said stock be removed from where they were so left, within a reasonable time, and forwarded to their destination, or unloaded and placed in proper shelter." Defendant denied the negligence specifically charged; denied that the conditions were such as to make it necessary to unload the cattle or treat them otherwise than it did; alleged that the car was forwarded by the first regular train leaving Newport, and carried forward without unnecessary delay. It also denied that the cattle were frozen or injuriously affected by the weather while they stood upon the side track or at any other time while in defendant's possession, "and denied that plaintiff has been damaged by any fault or negligence or breach of duty on its part."

In order to make out his case under these issues plaintiff introduced testimony to show that the cattle were in good condition when loaded in the car; that the loading was completed by 7 o'clock in the evening, when the car was taken by a switch engine to Newport, where it was placed upon a side track and allowed to remain for about four hours before being started on its journey south. As a witness, plaintiff further says that he accompanied the car from the start; that the night was clear and cold, and that it grew colder as it advanced, that the country west and north of Newport is open and flat and of lower elevation than the station, and that a hard wind was blowing from the northwest; that the cattle were severely chilled during the long wait on the side track, and that he tried in vain to find assistance in giving them protection, but there was no one at the station but the telegraph operator, to whom he appealed, but failed to take any steps to alleviate the condition of distress. He further testified—and without dispute—that live stock loaded in a car suffer more severely from wind and cold when

AGO, M. & ST. P. RY. CO.

(Iowa, July 9, 1910.)

[ep. 198.]

Required.*—A carrier of
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ty.—A carrier of live stock, sued for
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ed from overloading, without saying anything

Live Stock—Evidence—Admissibility.—A carrier of live
sued for loss through freezing, could show whether the car
as Overloaded.

Evidence—Expert Testimony—Freezing of Cattle.—Competent live
stock shippers, who saw a damaged shipment, could testify whether
stock would freeze in such a car at a temperature shown to have ex-
isted during transportation.

Evans and Weaver, JJ., dissenting.

Appeal from District Court, Allamakee County; L. E. Fel-
lows, Judge.

Action at law to recover damages sustained by plaintiff in
the shipment of a car load of cattle over defendant's line of
railway. Trial to a jury. Verdict and judgment for plaintiff,
and defendant appeals. Reversed.

See also, 117 N. W. 281.

M. B. Hendrick, H. H. Stilwell, J. C. Cook, and H. Loomis,
for appellant.

Wm. S. Hart, for appellee.

DEEMER, C. J. The petition alleges, in substance: That in
March, 1900, plaintiff delivered to defendant, a common car-
rier, at St. Paul, Minn., a car load of cattle in good condition,

*See generally, extensive note, 23 R. R. R. 176, 46 Am. & Eng. R.
Cas., N. S., 176.

†See note, 26 R. R. R. 312, 49 Am. & Eng. R. Cas., N. S., 312.

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cattle at this point, while defendant denies it. The trial court instructed that defendant's duty was to exercise the highest degree of care in the safety of the cattle, and that it could not excuse itself, except by showing that the damage was caused by some conditions which were beyond its power to know of and prevent. As already observed, this is not a case where the carrier is charged with delay in the shipment of the stock; nor is plaintiff relying upon the presumptions arising where one shows the delivery of property in good condition to a carrier and a redelivery by the carrier to the shipper of the goods in a damaged condition. Here plaintiff pleaded and attempted to prove defendant's negligent treatment of the cattle while at Newport, and the degree of care which the law imposed upon it in caring for the stock during the delay was an incident of the shipment. In this connection it must be remembered that plaintiff accompanied his stock, was with them at Newport, and, as he says, notified defendant's employees of the dangers incident to the change in climatic conditions.

As we understand it, the degree of care required of a carrier under such circumstances is not the highest, but ordinary and reasonable, care, such care as an ordinary careful person would exercise under the same or similar circumstances. See, as supporting this rule, *German v. R. R. Co.*, 38 Iowa, 127; *Beard v. R. R. Co.*, 79 Iowa, 518, 44 N. W. 800, 7 L. R. A. 280, 18 Am. St. Rep. 381; *Peterson v. Ry. Co.*, 19 S. D. 122, 102 N. W. 595; *McGraw v. R. R. Co.*, 18 W. Va. 361, 41 Am. Rep. 696; *Truax v. Philadelphia R. R. Co.*, 3 Houst. (Del.) 233; *Peck v. Weeks*, 34 Conn. 145; *Chapin v. R. R. Co.*, 79 Iowa, 582, 44 N. W. 820. It is generally held that where goods of a perishable nature are injured or practically destroyed by a sudden and unexpected freeze, or from other cause of a like nature, the carrier is not liable in the absence of a showing of negligence on its part. If the transportation is being carried on at a season of the year and in a locality where a freezing spell is, in the nature of things, probable, the carrier will be held liable for loss or injury to perishable goods caused by their being frozen only when common prudence would have required it to anticipate such weather conditions as were probable, and to provide against them by sheltering the goods. Ordinary care and prudence upon its part is all that is required. See, as supporting this view, *Vail v. Pacific R. R. Co.*, 63 Mo. 230; *Swetland v. Boston R. R. Co.*, 102 Mass. 276; *American Express Co. v. Smith*, 33 Ohio St. 511, 31 Am. Rep. 561; *Nashville R. R. Co. v. David*, 6 Heisk. (Tenn.) 261, 19 Am. Rep. 594. See, also: *Chicgao R. R. v. Woodward*, 164 Ind. 360, 72 N. E. 558, 73 N. E. 810; *Black v. C., B. & O. R. R.*, 30 Neb. 197, 46 N. W. 428; *Ill. Cent. R. R. v. Holt* (Ky.) 92 S. W. 540; *Maslin v. B. & O. R. R.*, 14 W. Va. 180, 35 Am. Rep. 748; *Nashville R. R. v. Jackson*, 6 Heisk.

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will than when moving. Also, that as the
led south, moderated temperature was
then, evidence respecting the condi-
ed at the place of destination. The
a written contract, under which
such contract these provisions,
company shall not be liable
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the following, among other, in-
delay in the transportation of the
as required to use the highest degree of
care for their safety. If the removal of the
car during the time of the delay or at any time
the defendant's possession, was necessary for their
protection from injury, and it was possible to remove them, de-
endant was bound to do so, and was bound to give them what-
ever personal attention was necessary for their protection, dur-
ing the whole time the cattle were in possession of defendant.
When the defendant contracted to carry the cattle to their desti-
nation, the law imposed upon it an obligation to carry them in
a proper manner, and deliver them in good condition, consider-
ing the ordinary perils of the road; and if it failed to deliver
them in such condition, it is responsible in damages for such
failure, unless it can excuse itself by showing that the damage
was caused by some condition beyond its power to know of and
prevent."

These instructions are challenged by defendant for the reason
that they imposed upon defendant the highest degree of care
known to the law, whereas, under the facts disclosed by the
record, nothing more than ordinary care was required. It must
be borne in mind that there was no negligent delay in the ship-
ment of the cattle. They were taken on defendant's first regu-
lar train leaving Newport after their arrival at that point, and it
is not claimed that defendant's train schedules were inadequate,
or that the animals should have gone forward from Newport at
an earlier hour than they did. It is defendant's treatment of
the cattle while at Newport, awaiting the arrival of a south-
bound train, which is relied upon as a ground for recovery.
Plaintiff says that defendant was negligent in its care of the

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same in either case, but where the shipper accompanies the property the burden is upon him, as we shall presently see, of showing that the damage did not result through any fault of his own in loading or caring for the stock. And, as a general rule, he must also show such a state of facts as makes out a *prima facie* case of negligence on the part of the defendant.

2. The instruction quoted, as well as others, placed the burden upon defendant of showing that the damages done to the cattle were not the result of its (defendant's) negligence. Plaintiff in this case accompanied the stock, and he assumed the burden of proving defendant's negligence not only in his pleading, but in the introduction of his testimony. The rule in this state and the rule which generally obtains in such cases is as follows: "But where the shipper accompanies the live stock on the transit, the burden is not on the carrier to prove that loss or injury was occasioned by the inherent or natural propensities of the animals themselves, since in that case the carrier has not the sole custody of the animals. In such a case no presumption of negligence arises merely from the loss or injury. Where the shipper is in charge of his own live stock in transit, he is presumed to know the cause of the loss or injury." *St. Louis, etc., R. Co. v. Wells*, 81 Ark. 469, 99 S. W. 534; *Adams Express Co. v. Bratton*, 106 Ill. App. 563.

In *Cincinnati, etc., R. Co. v. Greening*, 30 Ky. Law Rep. 1180, 100 S. W. 825, the court said: "The evidence is uncontradicted that, when the stock were delivered to the carriers at Moreland, Ky., they were in first-class condition; when they were received by the shipper at Atlanta, Ga., they were bruised, cut, starved, and otherwise greatly injured. Neither appellee nor any person representing him accompanied the stock. They were in the exclusive care and custody of the carrier from the time they were received until their delivery, and, under circumstances like these, the carrier will not be exonerated from liability merely by introducing its employees to show that it was not guilty of any negligence in the transportation. It is true that carriers of live stock are not insurers, as are carriers of goods and other inanimate freight, but, as said in *Louisville, C. & St. L. R. Co. v. Hedger*, 9 Bush (Ky.) 645, 15 Am. Rep. 740: 'The company, when it undertakes the exercise of this public employment, should be held to a greater degree of diligence than that required of a mere bailee. The liability of the carrier, it is true, is greatly lessened by relaxing the rule applicable to carrying ordinary goods and wares. Still, this modification of the principle does not relieve him from that high degree of diligence that the nature of the employment requires. In affording means of transportation, the company should be held to that degree of care and diligence that a prudent and careful person would exercise in such matters, and if the live stock should be lost

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or injured while in the custody and care of the company, or its agents, for transportation, this should be prima facie evidence of negligence, and the burden of proof is on the carrier to rebut this presumption.' Where, however, the shipper accompanies the stock, then a different rule as to the burden of proof obtains. Thus, in the case *supra*, it is said: 'Where the owner contracts, however, to load and unload his stock and to take charge of them during transportation, as in this case, and does in fact do so, the burden of proof, where the company is charged with negligence for the loss or injury to the stock, is upon the owner, as the party who has the care of the stock is presumed to know how the injury occurred, and must himself suffer the loss, unless negligence is shown on the part of the carrier or employees.' To the same effect is *Louisville & N. R. Co. v. Wathen*, 22 Ky. Law Rep. 82, 49 S. W. 185; *Louisville & N. R. Co. v. Harned*, 23 Ky. Law Rep. 1651, 66 S. W. 25. In *Hutchinson on Carriers*, § 1357, the rule is thus stated: 'If live stock which is being transported is under the carrier's exclusive control, its delivery at destination in an injured condition will be prima facie evidence that the injury arose from some cause for which he was responsible, and he will be liable to the extent to which the shipper is damaged, unless he can show that the injury resulted from a cause for which he will be excused by the law, or by the terms of his contract. But where, as is frequently the case, the shipper accompanies his live stock for the purpose of caring for it during the transportation, the same rule as to the burden of proof is held not to apply. The stock is not in the carrier's exclusive control or custody, nor are his means of information superior to those of the shipper, who is in a position to know as well as the carrier of the causes which produce the injury. In order, therefore, that the shipper who accompanies his live stock may recover for injuries received by him during the transportation, he must not only show that he himself was free from negligence, but that the injuries were caused by a breach of duty on the part of the carrier.' Therefore, the stock having been received by the carriers in good condition, and being in their exclusive custody, and not accompanied by the owner, the burden of proof was upon them to show how the injuries received by the stock occurred, and that they were not attributable to their negligence." Our own cases support this view. See *Faust v. R. R. Co.*, 104 Iowa, 241, 73 N. W. 623, 65 Am. St. Rep. 454; *Grieve v. R. R.*, 104 Iowa, 664, 74 N. W. 192; *Burgher v. Ry. Co.*, 105 Iowa, 335, 75 N. W. 192; *McNamus v. Ry. Co.*, 138 Iowa, 151, 115 N. W. 921. See, also, *R. R. Co. v. Sherwood*, 132 Ind. 129, 31 N. E. 781, 17 L. R. A. 339, 32 Am. St. Rep. 239.

In 4 *Elliott on Railways*, § 1549, Judge Elliott says: "The

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fact that the owner, or his agent, is furnished transportation by the carrier and goes with his cattle or horses to look after and care for them, especially if he has agreed to do so in the contract of carriage, often exerts an important influence in determining the duties and liabilities of the carrier in the particular case. As we shall hereafter show it may relieve the carrier from the duty to feed and water and otherwise give particular attention to the stock; but it will not relieve the carrier from the duty to afford the owner reasonable opportunities for so doing. The fact that the owner accompanies the stock and takes charge of it may also be important upon the question of contributory negligence. * * * So, where the owner accompanies the stock, under a special contract to care for them himself, he may well be presumed to be as well acquainted with the facts in regard to their loss or injury as the carrier, and as they may have been injured because of his own negligence, or because of their inherent nature and propensities, and not by the negligence of the carrier, it is but just to require him to show the facts. The rule in such cases, therefore, is that the burden of proof is upon the plaintiff to show that a breach of duty upon the part of the carrier caused the injury or loss, and if the carrier is liable only for negligence, the burden is upon the plaintiff to show such negligence. It has also been held that a railroad company is not liable as an insurer where the car in which animals are shipped is in the possession and control of their owner under a contract that he should take care of them, and that if they are injured by the act of the owner the carrier is not liable no matter whether such act was negligent or not. The court further held, in the case just referred to, that even if the special contract was prohibited by statute, and therefore invalid, there could be no recovery."

3. Defendant offered to show what plaintiff said to the conductor of the train who took the car of cattle from River Junction to Dubuque; that the reason why the cattle were down in the car and were in a damaged condition was that the commission men who loaded them at South St. Paul put too many in the car; and that he said nothing about the cattle being frozen. There was no testimony that any one of defendant's agents had inspected the car when loaded, but defendant did issue a bill of lading or live stock contract which recited that the car of cattle weighed 22,000 lbs. and was received in apparent good order for shipment to Lansing, Iowa. There is no testimony that defendant weighed the cattle; but the evidence showed that no matter what the weight, the shipper had to pay for the car on the basis of 22,000 lbs. Under the rules heretofore announced we think these admissions of the plaintiff should have been received in evidence. Nothing in *Kinnick v. R. R. Co.*, 69 Iowa, 665, 29 N. W. 772, runs counter to this view. At most it

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was a question for the jury to determine under all the testimony as to whether or not defendant knew or should have known the manner in which the stock was loaded and assumed the risks incident thereto. There were 62 head of these cattle loaded into the car, and defendant claims that this was too great a number, and that this was the cause of the trouble. We think the testimony of the conductor should have been received. Another witness who was a stock shipper and who saw the car of stock was asked as to whether or not it was overloaded, but he was not permitted to answer. We think his testimony should have been received. See *Grieve v. R. R. Co.*, *supra*; *Hart v. Ry. Co.*, 69 Iowa, 485, 29 N. W. 597.

In the latter case it is said: "The carrier is held to be an insurer of the safety of the property while he has it in possession as a carrier. His undertaking for the care and safety of the property arises, by the implication of law, out of the contract for its carriage. The rule which holds him to be an insurer of the property is founded upon considerations of public policy. The reason of the rule is that, as the carrier ordinarily has the absolute possession and control of the property while it is in course of shipment, he has the most tempting opportunities for embezzlement or for fraudulent collusion with others. Therefore, if it is lost or destroyed while in his custody, the policy of the law imposes the loss upon him. *Coggs v. Bernard*, 2 Ld. Raym. 909; *Forward v. Pittard*, 1 Durn. & E. 27; *Riley v. Horne*, 5 Bing. 217; *Thomas v. Railway Co.*, 10 Metc. (Mass.) 472, 43 Am. Dec. 444; *Roberts v. Turner*, 12 Johns. (N. Y.) 232, 7 Am. Dec. 311; *Moses v. Railway Co.*, 24 N. H. 71, 55 Am. Dec. 222; *Rixford v. Smith*, 52 N. H. 355, 13 Am. Rep. 42. His undertaking for the safety of the property, however, is not absolute. He has never been held to be an insurer against injuries occasioned by the act of God, or the public enemy, and there is no reason why he should be; and it is equally clear, we think, that there is no consideration of policy which demands that he should be held to account to the owner for an injury which is occasioned by the owner's own act; and whether the act of the owner by which the injury was caused amounted to negligence is immaterial also. If the immediate cause of the loss was the act of the owner, as between the parties, absolute justice demands that the loss should fall upon him, rather than upon the one who has been guilty of no wrong; and it can make no difference that the act cannot be said to be either wrongful or negligent."

Competent stock shippers who saw the car of stock at New Albin were asked whether or not cattle would freeze in a car similar to the one in which plaintiff's stock were shipped with a temperature such as was shown by the testimony to have existed at Newport and at other points on defendant's line of road.

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They were not permitted to answer. We think these rulings were erroneous and that the testimony should have been received. *Betts v. Ry. Co.*, 92 Iowa, 343, 60 N. W. 623, 26 L. R. A. 248, 54 Am. St. Rep. 558; *Hutchinson v. R. R. Co.*, 37 Minn. 524, 35 N. W. 433.

For the errors pointed out the judgment must be, and it is, reversed.

D'ARCY v. ADAMS EXPRESS CO.

(Supreme Court of Michigan, July 14, 1910.)

[127 N. W. Rep. 261.]

Carriers—Action—Loss of Goods—Limitation of Liability—Failure to State Value.*—Where the consignor of goods by express fails to place a value on the shipment, as called on to do by the bill of lading filled out by him, the alternative provision thereof limiting the value to \$50 will prevent any further recovery.

Error to Circuit Court, Kalamazoo County; Frank E. Knapen, Judge.

Action by Frank P. D'Arcy against the Adams Express Company. Judgment for plaintiff, and defendant brings writ of error. Reversed, and a new trial granted.

Argued before BIRD, C. J., and OSTRANDER, HOOKER, BLAIR, and STONE, JJ.

Harry C. Howard, for appellant.

Alfred J. Mills, for appellee.

BLAIR, J. This case was tried by the court without a jury and the court made the following findings of fact and of law:

"On July 27, 1906, the plaintiff, a jeweler and manufacturer at the city of Kalamazoo, shipped by the defendant express company a small package addressed to 'David Ullman & Co., New York City,' containing a quantity of valuable opals. Upon the package was the plaintiff's address, as well as the address of the consignee and also the word 'Opals.' The plaintiff had been in the habit of shipping articles and merchandise by the defendant express company, and defendant had furnished him with a book of receipts to facilitate such shipments. The plaintiff himself filled out the receipt covering the shipment in question in this case and a copy of the same is attached to these findings. The plaintiff delivered the package in question to one of the defendant's drivers, who called at his store for the same and signed the receipt. Plaintiff testified that he thought

*See note, 28 R. R. R. 413, 51 Am. & Eng. R. Cas., N. S., 413.

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but was not positive, that he informed the driver that the package contained opals. The charges were not paid in advance by plaintiff, but were to be collected of the consignee upon delivery. The defendant lost the package in shipment and same was never delivered to the consignee. The plaintiff on or about November 15, 1906, made a claim as against the defendant for the value of the opals, but defendant denied its liability, except in the amount of fifty dollars (\$50), and some time in March, 1907, and before the commencement of this suit, made a tender to plaintiff of fifty dollars (\$50) in full of its liability in the matter, which plaintiff declined to accept. The package contained 33 opals of 2 karats in size; 44, 1½ karats in size, and 54, 1 karat in size. I find from the testimony that these opals were fairly worth two dollars (\$2) per karat at the city of Kalamazoo at the date of said shipment, and as a whole, the sum of three hundred and seventy-two dollars (\$372).

"Findings of Law.

"Under the facts, as above found, the plaintiff is entitled to recover the full amount of his loss, and is not limited to the amount of fifty dollars (\$50). The opals were received by the defendant with notice and knowledge that the package contained valuable opals. The defendant made no inquiry as to their special value, and the limit of liability expressed in the receipt was waived.* * * The plaintiff is entitled to a judgment as against the defendant for the sum of three hundred and seventy-two dollars (\$372) the fair market value of the opals at the date of shipment, with interest at five (5) per cent per annum from that date, namely, fifty-one and 51-100 (\$51.51) dollars. Judgment will be entered in favor of the plaintiff and against the defendant for the sum of four hundred and twenty-four (\$424) dollars, with costs of suit to be taxed."

A portion of the copy of the receipt attached to the findings of fact is as follows: "(Copy of Receipt.) The company's charge is based upon the value of the property, which must be declared by the shipper. Adams Express Company. Received from F. P. D'Arcy the following articles, subject to the Contract printed below. (Not Negotiable.) Date 7-27. Article. Value. C. O. D. 1 Pack opals. Consignee. Destination. David Ullman & Co., N. Y. Charges. Received from the Company. Huelser. No. of Pieces Received. 1. In consideration of the rate charged for carrying said property, which is regulated by the value thereof and is based upon a valuation of not exceeding fifty dollars unless a greater value is declared, the shipper agrees that the value of said property is not more than fifty dollars, unless a greater value is stated herein, and that the company shall not be liable in any event for more than the value so stated, nor for more than fifty dollars if no value is stated herein."

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By the terms of the receipt filled out by plaintiff, the duty of fixing a valuation upon the package of opals was imposed upon plaintiff. He did not discharge this duty, and was, therefore, bound by his agreement that the company should not be liable for more than \$50. *Smith v. American Express Co.*, 108 Mich. 572, 66 N. W. 479.

The judgment is reversed, and a new trial granted.

OSTROOT v. NORTHERN PAC. RY. CO. et al.

(Supreme Court of Minnesota, July 22, 1910.)

[127 N. W. Rep. 177.]

Carriers — Carriage of Goods — Contracts Limiting Liability.*—A contract between a common carrier and a shipper, limiting the carrier's liability, in case of loss of the goods, to a stipulated valuation, will be upheld if it is made to appear that the contract was fairly entered into by the shipper, with full freedom of choice, and that it is also just and reasonable.

Carriers — Carriage of Goods — Limiting Liability—Unreasonable Valuation.—In this case the subject-matter of the shipment was household goods, including a piano, and the alleged contract upon which the carrier relied fixed their value at five cents a pound. The trial court found that the contract was not fairly entered into, nor was it just or reasonable. Held, that the finding was sustained by the evidence.

(Syllabus by the Court.)

Appeal from District Court, Hennepin County; Andrew Holt, Judge.

Action by A. E. Ostroot against the Northern Pacific Railway Company and others. Judgment for plaintiff, and defendant Northern Pacific Railway Company appeals. Affirmed.

Charles W. Bunn and *Charles A. Hart*, for appellant.
Thomas Kneeland, for respondent.

START, C. J. This action was brought in the district court of the county of Hennepin to recover the value of certain household goods and other chattels, including a piano, which were destroyed by fire while in the possession of the Northern Pacific Railway Company, hereafter referred to as the defendant. The complaint alleged that the plaintiff was the owner of the goods, which were of the aggregate value of \$1,262.50, and that

*See foot-note of *Winslow Bros. Co. v. Atlantic Coast Line R. Co.* (N. Car.), 33 R. R. R. 752, 56 Am. & Eng. R. Cas., N. S., 752.

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they were delivered to the defendant at Minneapolis, to be transported by it to Moscow, Idaho, and that by its negligence they were destroyed by fire while they were in its possession. The answer of the defendant put in issue the allegations of the complaint as to plaintiff's ownership of the goods and their value, and as an affirmative defense alleged that by the contract of shipment it was agreed that the value of the goods was \$5 per 100 pounds, and no more; that the defendant had no knowledge that they were of any greater value, and accepted and carried them for a charge based upon such agreed valuation; and that, if it had known that they were of greater value, a correspondingly greater charge would have been made for their transportation. The reply put in issue the affirmative allegations of the answer.

The cause was tried by the court without a jury, and the facts found, so far as here material, are to the effect following: On April 4, 1908, the plaintiff was the owner of the goods, including the piano, which were of the aggregate value of \$750 and weighed 5,150 pounds. Prior to the date named the plaintiff delivered the goods to the Cameron Transfer & Storage Company at Minneapolis, and directed it to keep them in storage and to ship them for him to Moscow, Idaho. The storage company, through its agent, the Boyd Transfer & Storage Company, delivered them in a loaded car to the defendant, at Minneapolis, which car, so loaded, was received by the defendant for transportation to Spokane, there to be delivered to the Northwest Transportation & Storage Company for transportation to its destination at Moscow, Idaho. Prior to April 4, 1908, there was an oral understanding between plaintiff and the Cameron Company that the goods should be transferred from Minneapolis to Spokane in a collective or pool car of household goods in care of the Northwestern Company at Spokane, where such car load was to be distributed, and the goods of plaintiff were to be thereafter shipped and delivered to him at Moscow. The same were to be shipped by the Cameron Company with the express understanding as a part of the collective car of household goods, and that plaintiff's goods, with all of the other goods in the car, were to be released at a valuation of \$5 per hundredweight. The goods were received by the Cameron Company for shipment with the oral understanding, had between plaintiff and it, that they were all secondhand household goods or emigrant movables, and might be so classified. The receipt for the goods was delivered by the Cameron Company to the plaintiff on April 4, 1908, after his goods had left the actual possession of the Cameron Company and were in the possession of the Boyd Company to be placed in the car for actual transportation on the railroad of the defendant. The valuation of \$5 per hundredweight is the valuation expressed in the railway company's tar-

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iffs applicable to shipments made under the so-called released rate, and not the result of any actual estimation, computation, or consideration of actual value of the goods by any of the parties to this action before the time of the shipment of the goods of plaintiff. He had no knowledge of nor anything to do with the Boyd Company or its transactions with the defendant in relation to his goods or their shipment. The freight charges paid by plaintiff to the Cameron Company from Minneapolis to Moscow were on the household goods \$95.28, and an additional \$5 on the piano, and for packing and carting the same \$19.15, making a total of \$119.43. The plaintiff did not sign any receipt, bill of lading, or other contract with respect to shipment or transportation of his goods, nor was any bill of lading delivered to him personally by the defendant railway company. The rate of the defendant for shipment upon car load lots of household goods from Minneapolis to Spokane, where no limitation of liability was fixed was \$1.45 per hundredweight; and where a limitation of liability was fixed and agreed upon at \$5 the rate was \$1.25 per hundredweight, and upon emigrant movables 75 cents. Such rates had been duly posted and were in force at the time of the shipment herein. While the goods were being transported by the defendant and were in its possession, they were lost by fire, as stated in the complaint, through the negligence of the defendant. After the Boyd Company had loaded plaintiff's goods in the railway car with other goods, it sealed the car and billed the same under the tariff of emigrant movables, and received from the defendant a bill of lading upon the face of which it was stated: "O. R. release \$5. per cwt." The trial court found as a conclusion of fact and law that the valuation placed upon the plaintiff's goods by the defendant was not fairly entered into, nor was it just and reasonable, and that plaintiff have judgment for \$750. Judgment was so entered, from which the defendant appealed.

The pivotal question raised by defendant's assignments is the validity of the alleged contract as to the value of plaintiff's goods, so as to limit the amount of his recovery to such valuation. The alleged contract is an attempt by a common carrier to limit its common-law liability for the loss of the goods. Such contracts are exceptions to the common-law rule of liability, and they should be carefully scrutinized by the courts, and only enforced when it is made to appear that they are just and reasonable and were fairly entered into by the shipper, with full freedom of choice. It is the settled doctrine of this court that contracts so made, if fair, just, and reasonable, will be upheld as a proper mode of securing a due proportion between the amount for which the carrier may be responsible and the freight charges he receives, and of protecting himself from extravagant valuation in case of loss; but a mere arbitrary valuation,

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simply for the purpose of limiting the carrier's liability, will not be sustained as just and reasonable within the rule. *Alair v. Railway Co.*, 53 Minn. 160, 54 N. W. 1072, 19 L. R. A. 764, 39 Am. St. Rep. 588; *Douglas Co. v. Railway Co.*, 62 Minn. 288, 64 N. W. 899, 30 L. R. A. 860; *O'Malley v. Railway Co.*, 86 Minn. 380, 90 N. W. 974; *Murphy v. Express Co.*, 99 Minn. 230, 108 N. W. 1070; *Hanson v. Railway Co. (N. D.)* 121 N. W. 78.

The question whether such a contract was fairly entered into and is just and reasonable is ordinarily one of fact, and the controlling question in this case is whether the finding of the trial court of the ultimate fact, that the contract relied upon by the defendant was not fairly entered into by the plaintiff and was not just and reasonable, is supported by the evidence. The finding, although expressed in the conclusions of law, is one of fact, and must be so treated. *Dunnell's Minn. Pr. § 511*. The trial court found the evidentiary facts to be substantially as we have stated them, and the evidence is ample to sustain such findings. The refusal of the trial court to find certain other evidentiary facts as requested by the defendant was not error, for some of them were immaterial, and the evidence as to the others was not such as to require the court so to find as a matter of law. Upon a consideration of the evidence and the evidentiary facts found by the court, we cannot say, as a matter of law, that the contract was fairly entered into and is just and reasonable. On the contrary, we are of the opinion that the finding of the court that the contract was not fairly entered into and was not just and reasonable is supported by the evidence.

Judgment affirmed.

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(Supreme Court of Montana, May 28, 1910.)

[109 Pac. Rep. 713.]

Pleading—Complaint—Objection.—If a complaint states facts warranting recovery, defendant cannot object that it goes further, and unnecessarily specifies the elements of damages.

Pleading — Demurrer — Ambiguity — Form.—Under Rev. Codes, § 6535, providing that a demurrer must specify the ground of complaint, except the want of jurisdiction of defendant or the cause of action, the fact that there is another action pending between the parties on the same cause of action, and the failure to state a cause of action, an objection that the complaint is ambiguous cannot be taken by general demurrer. •

Pleading — Ambiguous Complaint — Sufficiency.— If a complaint,

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though ambiguous, states facts sufficient to warrant a recovery on any theory, it will be sustained.

Carriers—Carriage of Live Stock—Wrongful Acceptance for Transportation—Suit Therefor—Evidence.—In a suit for wrongful acceptance of horses for transportation, a contract offered in evidence contemplating carriage and transportation, modifying and limiting defendant's ordinary obligations, was wholly immaterial.

Carriers—Limitation of Liability—Pleading and Proof.—In a suit against a carrier, it pleaded in defense a contract between the parties modifying or limiting its ordinary obligations, but the copy offered in evidence differed therefrom, in that it purported to be between plaintiffs and another railroad company, and did not contain a stipulation limiting the time to sue which was in the contract pleaded. Held that, though the other company was only a division of defendant's own railway, plaintiffs, under the answer, were required to respond to a contract containing specific stipulations with defendant, and could not be required to respond to a contract with any other person not a party containing other and different stipulations, and it was not error to exclude such copy.

Carriers—Carriage of Live Stock—Liability for Damages.*—If when accepting horses for transportation a carrier was able to carry them to their destination and used reasonable diligence, no recovery can be had for damage thereto ordinarily incident to transportation, resulting from being confined in the cars and carried contrary to their natural habits, and from unavoidable delay.

Carriers—Carriage of Live Stock—Care Required.—By Rev. Codes, § 5355, a common carrier is liable for delay only when it is caused by his want of ordinary care and diligence; and hence, to avoid delay in delivery, the carrier need exercise reasonable care only.

Carriers—Carriage of Live Stock—Liability for Loss or Injury—Exemption of Carrier.—Under Rev. Codes, § 5353, making a carrier of property liable for loss or injury from any cause whatever, except from some inherent defect, vice, weakness or spontaneous action thereof, or the act of a public enemy, or "any irresistible superhuman cause," and Rev. Codes, § 5354, providing that these exemptions do not apply if the carrier negligently exposes the stock to the cause of loss, a carrier is liable for accepting stock without suitable facilities for transportation, or when it knows, or by ordinary care should know, they will be exposed to injury or loss from any exempted cause mentioned.

Carriers—Carriage of Live Stock—Care Required—Assumption of Risk—Apparent Danger.—A carrier was bound to notice signs of approaching danger such as to awaken apprehension when means

*See note, 23 R. R. R. 177, 46 Am. & Eng. R. Cas., N. S., 177; first foot-note of *Tiller & Smith v. Chicago, etc., R. Co. (Iowa)*, 33 R. R. R. 743, 56 Am. & Eng. R. Cas., N. S., 743; last foot-note of *Cormack v. New York, etc., R. Co. (N. Y.)*, 33 R. R. R. 629, 56 Am. & Eng. R. Cas., N. S., 629.

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of avoiding it were available, and, when the contract was made and the stock accepted, it assumed the risk, if it neglected to avail itself of information of danger which it had or might have had by exercising ordinary diligence.

Carriers—Carriage of Live Stock—Action for Negligence—Avoidance of Liability—What Must Be Shown.—In an action against a carrier for damages suffered through negligence in accepting horses for transportation without having proper means and facilities to transport and deliver them, plaintiffs need only show delivery to defendant, that it failed to carry them to their destination and deliver them, and that there was loss of or injury to some of them, and to acquit itself of responsibility defendant must show that, when it accepted them, it could not by ordinary care have known or anticipated that it could not discharge the obligation assumed, and it does not avail it that after acceptance its road was disabled by a flood, however unprecedented, if by reasonable diligence it could have anticipated that such would be the case.

Carriers—Carriage of Live Stock—Action for Damages—Question for Jury.—Evidence in such action held to present a case for the jury as to defendant's liability.

Carriers—Carriage of Live Stock—Action for Damages—Evidence.—In a suit against a carrier for accepting stock for shipment without proper means and facilities to transport and deliver, evidence as to the amount of damages held to support the verdict.

Appeal from District Court, Jefferson County; J. B. Poindexter, Judge.

Action by Benj. Wahle and another against the Great Northern Railway Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

Veazey & Veazey and *E. L. Bishop*, for appellant.

Kelly & Kelly and *M. H. Parker*, for respondents.

BRANTLY, C. J. This action was brought by plaintiffs to recover damages alleged to have been suffered through the negligence of the defendant railway company in accepting for transportation for them from Boulder, Mont., to Benson, Minn., two car loads of horses; the defendant at that time not having the proper means and facilities to transport and deliver them. Omitting the allegations touching the capacity of the defendant and the ownership and condition of the horses, the complaint states:

"(4) That on the 3d day of June, 1908, the plaintiffs delivered to the defendant corporation as a railway company engaged in the business of common carrier for hire, at the said town of Boulder, county of Jefferson, state of Montana, the said 67 head of horses in good order and condition for transportation by said defendant to the town of Benson, in the state of Minnesota.

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“(5) That at the time of the delivery of said horses by the plaintiffs to the defendant for shipment to Benson, Minn., the said defendant corporation did not have the proper means and facilities to transport said horses to, and deliver them in, the town of Benson, Minn., within a reasonable time and in good condition, all of which said corporation well knew.

“(6) That, by use of reasonable care and diligence by said corporation, its employees, and agents, said company would not have accepted said horses for shipment on the 3d day of June, 1908, when said defendant corporation, its employees and agents, well knew that it did not have the proper means and facilities to ship said horses to Benson, Minn., in a reasonable time and in good condition, or at all.

“(7) That on the 3d day of June, 1908, with full knowledge of the facts and premises, said defendant corporation, its employees, and agents, so negligently and carelessly conducted and so misbehaved in the premises, in its calling as a common carrier, accepted said horses from plaintiffs for shipment, and undertook to transport said horses upon its line of railroad from Boulder, Mont., to Benson, Minn., and caused them to be loaded in cars as its station at Boulder, Mont., and taken as far as Clancy, Mont., and on the 5th day of June, 1908, said horses were returned by the defendant corporation to Boulder, Mont., and turned back to these plaintiffs.

“(8) That, after accepting said horses for shipment as aforesaid, the defendant, by reason of its negligence, in not furnishing good and sufficient motive power and cars and in not properly managing and running its trains, and in not furnishing proper and adequate stockyard facilities for unloading, feeding, and watering said stock, caused the said train carrying said horses to be constantly delaying, suddenly jerked and jolted, whereby one horse was killed, and several badly cut and lacerated, and that said horses were kept on said train and in said yards without a suitable place to feed or water for a period of 47 hours, whereby they were all greatly weakened and emaciated.

“(9) That on account of the said defendant negligently accepting said horses for shipment, as aforesaid, when they did not have the proper means and facilities for shipping, by reason of which they could not transport them to their destination, as agreed upon, and on account of the negligent manner in which said horses were handled and abused while in its possession, and on account of its failure to provide proper cars, yards, and feed stations to properly feed and water said horses, while in its possession, said horses greatly depreciated in value, and plaintiffs were compelled to provide feed, pasturage, and care for said horses for several weeks, and to expend large sums of money for labor and expenses in loading and unloading and in caring

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for and finding a sale for same, to the plaintiffs' damage in the sum of \$500.

"Wherefore, plaintiffs pray judgment," etc.

The defendant's general demurrer having been overruled, it answered, admitting its acceptance of the horses, its agreement to transport them as alleged, and that certain of them were injured, but denying all other averments. It pleaded affirmatively that its ordinary duties and obligations as a common carrier had at the time of the delivery of the horses to it been modified by the terms of a special contract (set out in *hæc verba*), executed at the time by it and the plaintiffs. Among the stipulations therein was one to the effect that \$75 should be taken as the value of each of the horses and as fixing the basis of the rate charged for transportation. It was also stipulated that as a condition precedent to the right to recover any damages for loss or injury to the horses, or any of them, plaintiffs should give defendant notice in writing within 15 days after such loss or injury occurred or after the arrival of the horses at their place of destination. It is alleged that there was a failure by plaintiffs to comply with this stipulation. It is further alleged that the defendant accepted and endeavored to carry the horses to the agreed destination, but that, after the transportation had commenced, an unusual, extraordinary, and unprecedented flood washed away its roadbed, so that further transportation was impossible, and that the horses were on June 5th returned to plaintiffs at Boulder, the point of shipment. Upon these affirmative matters there was issue by reply. The plaintiffs had verdict and judgment. The defendant has appealed from the judgment and an order denying its motion for a new trial.

1. The first contention is that the court erred in overruling the demurrer. The argument is that, if we consider paragraphs 1 to 7, and part of paragraph 9, of the complaint, we find stated a cause of action for negligence by defendant for receiving and subjecting the horses to useless transportation, when it knew it had not facilities to enable it to make delivery of them at their destination; but that, if we consider paragraphs 1, 2, 3, 7, and 8 and other portions of paragraph 9, we find stated a cause of action for breach of duty by defendant as a common carrier to transport the horses with reasonable speed and due care. Hence, it is said that, since these allegations are contradictory and inconsistent, they mutually destroy each other, with the result that the complaint does not state a cause of action within the rule prescribed by the statute, to wit, that it shall contain a statement of the facts constituting the cause of action, in ordinary and concise language. Rev. Codes, § 6532. It is reasonably clear from an inspection of the complaint that the purpose of the pleader was to state a cause of action for a breach of duty by the defendant in accepting the horses for transportation and

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subjecting them to the damage necessarily incident to having them loaded on its cars and carrying them the distance it did, when it knew, or should have known, that it could not deliver them at their destination. It is conceded by counsel for defendant that it states facts sufficient to warrant a recovery on this theory for all damage which the horses suffered, whether it was aggravated by negligence on the part of the defendant in transporting them to Clancy, or by its omission to provide suitable facilities for unloading and feeding them at that place. If this is so, the defendant is in no position to object that the complaint goes further and specifies the elements of damage when it was not necessary to do so. The pleading is not a model, but the most that can be said of it is that it is ambiguous. This is a defect which can be reached only by special demurrer. Rev. Codes, § 6535. From this point of view, the allegations are neither contradictory nor inconsistent; and the rule, often announced by this court, that, if a complaint states facts sufficient to warrant a recovery upon any theory, it will be sustained, applies. *Donovan v. McDevitt*, 36 Mont. 61, 92 Pac. 49; *Raymond v. Blancgrass*, 36 Mont. 449, 93 Pac. 648, 15 L. R. A. (N. S.) 976; *Hoskins v. Northern Pacific Ry. Co.*, 39 Mont. 394, 102 Pac. 988.

2. Error is alleged upon the action of the court in excluding evidence of the contract pleaded in the answer, modifying and limiting the ordinary obligations of the defendant as a common carrier. The copy offered in evidence, though substantially the same in other particulars, differed from the contract pleaded in two important particulars. The contract pleaded purports to be between the plaintiffs and defendant. The copy offered purports to be between the plaintiffs and the Montana Central Railway Company. The contract pleaded also contains a stipulation to the effect that any action brought for damages for delay in transportation, or for loss or injury to any of the horses, must be brought, if at all, within three months after such loss or injury occurred, whereas the copy offered contains no such stipulation. Upon the theory that the action was brought for the wrongful acceptance by defendant of the horses for transportation, evidence of the contract was wholly immaterial; for, since it could not carry and deliver them as it undertook to do, it was wholly immaterial whether the defendant was guilty of unnecessary delay in delivering them, or caused loss of or injury to any of them by improper handling during the course of transportation from Boulder to Clancy, or by failing to provide proper facilities for caring for them at the latter place. The contract of carriage contemplated transportation and delivery. It being impossible for the defendant to perform this contract, it was immaterial whether it had been relieved by the stipulations of the special contract from any of the obligations ordi-

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narily incident to a contract of carriage. But, adopting the theory that the defendant was able at the time it accepted the horses to carry them to their destination and would have done so but for the unprecedented flood, the contract offered was not the one pleaded, and could not be any defense against a recovery for loss caused by delay in the performance of its contract, or for the injury resulting from the negligent handling of the horses or providing for care of them while on the way. The averment of such a contract between plaintiffs and defendant could not be supported by proof of a contract between the plaintiffs and a third party. If, as defendant contends, the Montana Central Railway was only a division of its own railway, and the parties understood when the contract was signed that such was the case, and that plaintiffs understood that they were in fact contracting with the defendant, the designation of it as Montana Central Railway being used merely as a convenient designation of that division, the case is in no wise aided. Under the allegations in the answer, the plaintiffs were required to respond to a contract containing specific stipulations entered into with the defendant, and could not at the trial be held to respond to a contract with any other person, not a party to the action, containing other and different stipulations.

3. Way, one of plaintiffs, testified that the horses had been loaded at Boulder at about 8 o'clock in the evening of June 3d; that the train reached Clancy, a distance of 22 miles away, about 3 o'clock next morning; that he then ascertained that a horse in one of the cars was down and at once requested the agent to unload the car containing it, so that he could find out what the trouble was; that the agent then informed him that all would have to be unloaded, which, owing to delay on the part of the agent, was not accomplished until about 6 o'clock, or three hours later. The injured horse was afterwards killed. The defendant examined the witness Murphy, its' assistant superintendent, as to the conditions existing along the line of defendant's railway at the time the horses were accepted for shipment at Boulder. He testified, among other things, that under the conditions as to high water and probable floods as he saw them he was of the opinion that it was consistent with careful and prudent railroading to send trains beyond Chancy on June 3d and during a part of the following day. On cross-examination he was asked and required to answer the following question: "Assuming that this car load of horses got into Clancy on the morning of June 4th some time about 2 or 3 o'clock, and that immediately thereafter the owner of the horses went to the agent of the company at the depot at Clancy and asked him when they were going to get out there, and he told him that he did not know, and that thereafter immediately he told him that one of those cars of horses would have to be unloaded

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because one of them was down in the car being trampled upon by the others, do you consider it careful and prudent rail-roading if this horse were left in that car until 6 o'clock that morning?" Answering, he said he did not. Objection was made that the question was improper, in that, being hypothetical, it recited a fact which did not appear from the evidence, viz., that the agent at Clancy knew the condition of the horse. It appears from the testimony of Way that the agent knew of the condition of the horse, and hence the question recited no fact which did not appear from the evidence. Assuming, therefore, that the question was otherwise pertinent and proper, the ruling was correct, because the question was not open to the objection made to it.

4. It is argued that the evidence is insufficient to sustain the verdict, in that it appears that, if there was any damage to the horses, it was only such as is ordinarily incident to the transportation of such animals, resulting from being confined in the cars and carried contrary to their natural habits and from unavoidable delay, etc., and in that the statements of the witnesses as to the extent of the damage are not sufficiently definite to justify a finding in any amount. It is also said that there is no evidence that at the time the defendant accepted the horses for transportation it knew that it did not possess ample facilities for carrying them to their destination. It may be conceded that the loss of the horse that was killed, and the depreciation in value of the others should be attributed to the cause assigned by the defendant. In that case no recovery could be had if it appeared from the evidence that at the time it accepted them the defendant was in a position to carry them to their destination and used reasonable diligence in that behalf. To avoid delay in delivery, the carrier is held to the exercise of reasonable care only. Rev. Codes, § 5355. A different rule of liability is imposed for loss or injury to the property while it is in his possession. He is liable in that case for loss or injury accruing from any cause whatever, except from some inherent defect, vice, weakness, or spontaneous action of the property itself, or the act of a public enemy, or any "irresistible superhuman cause." Rev. Codes, § 5353. But even these exemptions do not apply if the carrier negligently exposes the property to the cause of the loss. Rev. Codes, § 5354. The result of this latter provision is that acceptance of property by the carrier when he has not suitable facilities for its transportation, or when he knows, or by the exercise of ordinary care should know, that it will be exposed to injury or loss from any of the causes mentioned in the exemptions, he is liable; for, under such circumstances, the loss or injury is to be attributed to his own wrong, just as if he had wrongfully taken the property and converted it in the first place, and

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the measure of damages is the same. Hence under the application of this rule, which is assumed by the defendant to be correct, it does not matter that the injury complained of was due to the causes assigned by defendant, if it violated its duty in undertaking to carry the horses when it should not have done so. Under the rule recognized generally and followed by this court, in *Nelson v. Great Northern Ry. Co.*, 28 Mont. 297, 72 Pac. 642, the defendant was bound to take notice of the signs of approaching danger, and, if they were of such a character as to awaken reasonable apprehension at the time when the means of avoiding the danger could be availed of—that is, at the time the contract was made and the property accepted—the defendant assumed the risk, if it neglected to avail itself of the information which it had or might have had by the exercise of reasonable diligence. Its only alternative was to refuse to accept, or to accept with the consent of the plaintiffs, after giving them full information as to the conditions. And this brings us to the point when we must inquire what the evidence shows these conditions to have been on June 3d, and what knowledge the defendant had of them.

During the month of April a flood caused by the breaking of a dam in the Missouri river had washed away a considerable portion of defendant's track and roadbed between Clancy and Great Falls, over which it must convey all freight shipped to eastern points. This had been restored, but the roadbed was still unsettled and soft and in places unballasted. On June 3d, owing to heavy rains then and theretofore prevailing along the line of defendant's road, conditions in many places between Boulder and Great Falls were threatening. The water in the streams was continually rising. During the afternoon of the third a small portion of track had been washed out and restored. During the day application had been made to the defendant by the Northern Pacific Railway Company to have the passenger trains of the latter, carrying mail, nine in all, detoured from its main line, which had been washed out in places by high water in other parts of the state, to the main line of the defendant over the line extending from Boulder and Clancy to Helena and Great Falls. During the afternoon of the day, all available locomotives belonging to the defendant had been gathered at Helena, to be used in detouring these trains, and freight trains due to leave Clancy and other places to the south for Great Falls on that evening were all annulled. The transfer of the trains of the Northern Pacific Railway Company began with the early morning of the 4th. There had also been trouble with the telegraph line. At 3 o'clock p. m. a freight train left Great Falls for Helena. This arrived at the latter place on the morning of the 4th. The train having on board the plaintiffs' horses was the last freight train started

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in the direction of Great Falls from any point south of Clancy on the day of the 3d. One passenger train left Clancy late in the evening, and reached Great Falls on the morning of the 4th. Early in the morning of that day, the telegraph line became entirely disabled, and thereafter all passenger trains (the only ones moved) were handled by means of the long-distance telephone. At some time during the day, all trains were annulled and none were moved for some time thereafter, because of the flood which destroyed portions of the roadbed. The chief train dispatcher of the defendant testified that the agents of the defendant did not usually anticipate trouble in forwarding perishable property, such as horses, until conditions became serious, and that they were not regarded as serious until they were such as to tie up the business of the road entirely.

Under the issues presented by the pleadings, the plaintiffs were required to go no further than to prove that they delivered the horses to defendant; that it failed to carry them to their destination and deliver them; and that there was loss of or injury to some of them. To acquit itself of responsibility, the defendant was required to show that at the time of its acceptance it could not by the exercise of ordinary care have known or anticipated that it could not discharge the obligation thus assumed (*Jones v. Minneapolis & St. Louis R. Co.*, 91 Minn. 229, 97 N. W. 893, 103 Am. St. Rep. 507; *Grier v. St. Louis M. B. T. Co.*, 108 Mo. App. 565, 84 S. W. 158), and it does not avail it that, after acceptance, its road was disabled by the intervention of the flood, however unprecedented it may have been, if by the exercise of reasonable diligence it could have anticipated that such would be the case (*Nelson v. Great Northern Ry. Co.*, *supra*).

Under the facts stated, we do not think that we should conclude as a matter of law that the defendant has acquitted itself of responsibility. Of course, if the testimony of the train dispatcher is to be taken as conclusive of the question when a common carrier may or may not accept property for transportation, he would always, without reference to the character of the property, be justified in accepting it until it became impossible to carry it. The adoption of this rule would excuse the carrier entirely from the obligation to take note of facts which would lead a reasonable person to the conclusion that he could not discharge the attendant obligations. Taking into consideration the general condition of the line of defendant's road from the point of shipment to Great Falls, the prevalence of heavy rains along the line by which the streams were much swollen, that the water was constantly rising, that the conditions were threatening, that there had been trouble with the telegraph lines, that the roadbed was in places new and soft because of the rains, that a portion of it had been washed

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out within a few hours of the time of shipment, that all the available locomotives of the defendant were already held for the detouring of the trains of the Northern Pacific Railway over the portion of the line by which the horses must be carried, if at all, and that this would in any event cause some delay—we are of the opinion that the evidence presented a case for the jury, and that its finding thereon should not be disturbed.

The evidence submitted as to the amount of damage sustained by plaintiffs, apart from the value of the horse which was killed, is not as satisfactory as it might have been. It consists entirely of a statement by one of the plaintiffs, to the effect that two of those returned to him were cut, that they were all bruised and “skinned up” and had lost flesh, so that they were not fit for sale, and that he estimated their depreciation in value at \$10 a head. Nevertheless it furnished some tangible basis for an estimate by the jury; and, while their finding was for an amount much less than that at which the witness fixed it, we do not think the verdict should be set aside on the ground that there is no evidence to support it.

Incidentally the foregoing discussion disposes of all the other material contentions made by counsel. We shall, therefore, not give them special notice.

The judgment and order are affirmed.

Affirmed.

SMITH and HOLLOWAY, JJ., concur.

ATLANTIC COAST LINE R. CO. *v.* RICE.

(Supreme Court of Alabama, April 21, 1910. Rehearing Denied June 30, 1910.)

[52 So. Rep. 918.]

Carriers—Carriage of Goods—Loss or Injury—Liability of Carrier.*—The exceptions other than those legally possible of creation by special contract, to the exacting common-law liability of a common carrier of goods, are the acts of God and of the public enemy, where no negligence of omission or commission concurred therewith.

Carriers—Carriage of Animals—Liability for Loss—Damage.*—In the absence of contract limiting the liability, a carrier is an insurer against such loss or damage to live animals received for shipment, as do not arise from acts of God or the public enemy, nor from the nature or propensities of animals, against which due care could not provide.

Carriers—Carriage of Goods—Action for Loss or Damage—Burden of Proof.—The burden is on a carrier in order to escape liability for loss or damage of a consignment received by it to trace the loss or damage to negligence of the shipper, or one or more of the exceptions with which its negligence did not concur.

Carriers—Carriage of Goods—Duty to Transport.†—A common carrier is in general bound to transport all goods that are properly offered for that purpose.

Carriers—Carriage of Goods—Liability for Loss—Acceptance of Shipment.‡—Where a carrier accepts goods improperly packed, their condition being open to ordinary observation, the duty attaches of using due care for their safe carriage, and the carrier is subject to all the liabilities ordinarily attaching to an ordinary shipment of the same character.

Carriers—Carriage of Goods—Duty to Accept for Shipment.—A carrier has the right to inspect proffered shipments and to refuse them when not in fit condition for transportation, and, where ordinary observation would discover their unfitness, it is the duty of the carrier to refuse the shipment in order that the shipper may put it into a fit condition for transportation.

Carriers—Carriage of Live Animals—Liability for Loss—Contributory Negligence of Owner.—That a shipper of dogs delivered them to a carrier in a crate which was insufficient, so that a dog escaped,

*See extensive note, 23 R. R. R. 176, 46 Am. & Eng. R. Cas., N. S., 176.

†See first foot-note of *Pittsburg, etc., Ry. Co. v. Chicago* (Ill.), 35 R. R. R. 380, 58 Am. & Eng. R. Cas., N. S., 380; last foot-note of *Reid & Beam v. Southern Ry. Co.* (N. Car.), 31 R. R. R. 352, 54 Am. & Eng. R. Cas., N. S., 352.

‡See extensive note, 11 R. R. R. 419, 34 Am. & Eng. R. Cas., N. S., 419.

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was not negligence exonerating the carrier; the defense of contributory negligence not being available in such case.

Appeal from City Court of Montgomery; W. H. Thomas, Judge.

Action by Julian M. Rice against the Atlantic Coast Line Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

The complaint in substance alleged that the plaintiff bought a ticket at Kissimmee, Fla., to Montgomery, Ala., paying therefor \$1.75; that he presented the ticket to the agent at Kissimmee, together with the crate containing two dogs, and that the agent delivered him a check for said crate, charging him the excess therefor, from Kissimmee to Montgomery; that when he delivered the crate to defendant's agent it contained two dogs; and that when he presented his check at Montgomery, and the crate was delivered to him, one of the dogs had escaped. Plea 3 was as follows: "For further answer defendant says that the plaintiff presented for transportation two dogs in a box which was locked, and to which plaintiff had and retained the key, and that defendant accepted said box containing said dogs in the condition it was at the time of its delivery by plaintiff, to wit, for carriage, and that while the said box was in the same condition as when presented to and accepted by defendant, the dog, for a failure to deliver which this action is brought, escaped from said box and from the car of this defendant, in which it was being transported, without fault on the part of this defendant, its agents or servants. This defendant therefore pleads that the escape and loss of the dog was wholly due to the fault of the plaintiff, and not to any fault of this defendant, its agents or servants."

A. H. Arrington and John R. Tyson, for appellant.

Fred S. Ball and Frank Stollenwerck, for appellee.

MCCLELLAN, J. The action is for breach of a contract between appellee (plaintiff) and the appellant, a common carrier, to transport and deliver a dog from a point in the state of Florida to appellee at Montgomery, Ala.

Plea 3, which will be set out in the report of the appeal, avers, in substance, that the dog escaped, in transit, from the locked crate, appellee having the key, in which it was when delivered to the carrier by appellee, and from the appellant's car, without fault of the carrier; and that the crate or box was delivered to appellee at Montgomery in the same condition as when received by the carrier at the initial point in Florida; and concludes that the loss of the dog was wholly due to the fault of the appellee. It is necessarily inferable from the averments of the plea that the escape of the dog from the crate or box was effected through an opening therein.

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Whatever may have been, or may now be, the opinion elsewhere prevailing, it is settled with us that a carrier, undertaking to transport and deliver live animals, is subject to the same responsibilities, with respect thereto, as in ordinary cases of goods received for transportation by a common carrier, except it is not accountable for, and does not assume the risk of, loss or damage to live animals "arising from their nature and propensities, and which could not be prevented by foresight, vigilance, and care." *Central Railroad v. Smitha & Chastain*, 85 Ala. 47, 4 South. 708; *South & N. R. R. Co. v. Henlein*, 52 Atl. 606, 23 Am. Rep. 578; *Western R. Co. v. Harwell*, 91 Ala. 340, 8 South. 649. The exceptions, aside from those legally possible of creation by special contract, to the exacting common-law liability of a common carrier in the carriage of goods, are the acts of God and of the public enemy, where no negligence, of omission or commission, concurred therewith to produce the damnifying result. Authorities *supra*; *Steele v. Townsend*, 37 Ala. 247, 79 Am. Dec. 49; *McCarthy v. L. & N. R. R. Co.*, 102 Ala. 193, 14 South. 370, 48 Am. St. Rep. 29; *Green v. L. & N. R. R. Co.*, 50 South. 937. In short, in the absence of contract limiting liability, the rule here is that a common carrier, in cases of loss or damage to live animals received for shipment, is an insurer against such loss or damages as do not arise from the act of God, the public enemy, and those arising from the nature and propensities of the live animals so received for transportation, and against which due care could not provide. And to avail in exoneration of legally unmodified liability of the common carrier for the loss or damage of a consignment received by it, the burden is on the carrier to trace the loss or damage to negligence of the shipper, or to one or more of the exceptions, with which its negligence did not concur. Authorities *supra*.

Counsel for both litigants construe plea 3 as asserting, when reduced to legal formula, that where the shipper of a live animal crates or boxes it, the shipper, and not the common carrier, assumes the risk of escape of the animal therefrom if such escape results from the nature and propensities of the animal. To state the matter otherwise: That where such live animal is crated or boxed by the shipper and escapes therefrom, after reception by the carrier, as the result of natural propensity, the shipper, and not the carrier, is negligent.

It is not contended that the carrier was ignorant of the character of the shipment. The carrier affirms, by its plea as construed by counsel, and the shipper (here) denies, by his demurrer thereto, the correctness of the proposition. The gist of the argument in negation of the soundness of the proposition is that the carrier, by receiving the animal so crated or boxed, assumes the risk of the sufficiency of the inclosure, else it

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should refuse to receive the subject of the shipment if ordinary observation would disclose its insufficiency. On the other hand, the gist of the argument in affirmation of the proposition is that by offering a self-contrived inclosure for the live animal the shipper relieves the carrier of any duty to overlook the inclosure with a view to restraining the natural propensity of the animal to leave confinement in the crate or box. Without considering or treating the plea as asserting, well or ill, any other matter of defense than that which counsel for both parties ascribe to it, we will decide only the question raised below and argued here.

Subject to the exception, among others not now necessary to enumerate, that it may properly refuse to accept for transportation goods "tendered in an unfit condition" therefor, a common carrier is duty bound to transport all goods that are properly offered for that purpose. 4 Elliott on R. R., § 1466; 1 Hutchinson on Carriers, §§ 143, 145. While the carrier may refuse to accept goods improperly packed, yet if it accepts them in that condition—a condition open to ordinary observation—"the duty attaches of exercising due care for its safe carriage." *Union Ex. Co. v. Graham*, 26 Ohio St. 595; *E. J. & E. Ry. Co. v. Bates Machine Co.*, 98 Ill. App. 311, 315; *Hannibal R. R. v. Swift*, 12 Wall. 262, 272, 20 South. 423; 4 Elliott on R. R., § 1466, p. 154; *Munster v. S. E. Ry. Co.*, 4 C. B. N. S. 676. Mr. Elliott, at the citation last made from his work, says: "If goods which may be properly rejected are actually, not merely constructively, accepted for carriage, the common carrier's liability attaches."

In the case of *Hannibal Railroad v. Swift*, supra, the Supreme Court dealt with this state of fact: An army surgeon was en route under orders, with a part of the command to which he was attached, from South Dakota to Cincinnati. At St. Joseph, Mo., it was necessary to use appellant's line of road across to Hannibal, in that state. Along this line of road the country was represented by appellant's servants as being in a state of insurrection dangerous to persons and property on its trains, and, on this ground, refused to engage at St. Joseph, for the transportation of the troops, their equipment and the personal effects of the appellee, Swift, to Hannibal. On demand of the commanding officer the appellant furnished the required transportation for troops, baggage, etc., including the chattels of the appellee, and the effects of the plaintiff were loaded in a car by the troops. The appellant's agents took charge of the car after it was loaded and locked up by the commanding officer, and placed it in the train. These agents had nothing to do with the selection, loading, or packing of the car. En route the car was burned, and with it appellee's effects. The court, through Justice Field, said: "* * * The lia-

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bility of the carrier attached when it thus took possession of the property. No objection was made at the time to the selection of a separate car for the baggage and other property of the troops and the plaintiff, or to the kind of property offered for transportation, or to the manner in which the property was packed. * * * If objection existed on any of these grounds, or on any other ground not concealed but open to the observation of the company, it should have been stated before the property was received. The company might then have insisted, as a condition of its undertaking the transportation, upon the selection of a different car, or upon superintending its loading. * * * Not having thus insisted, but having received the property and undertaken its transportation in the car in which it was placed, the company assumed, with respect to it, the ordinary liabilities of a common carrier. * * * The common carrier is regarded as an insurer (subject to exceptions, we interpolate) of the property carried, and upon him the duty rests to see that the packing of the conveyance is such as to secure safety. The consequences of his neglect in these particulars cannot be transferred to the owner of the property." For the value attached to the decision as authority, see 7 Rose's Notes, pp. 542, 544.

We think it can be safely ruled, in accord with *Hannibal R. R. v. Swift* and the other texts and decisions cited, that, first, the carrier has the right to inspect proffered shipments and to refuse their acceptance when not in fit condition for transportation; second, that, if unfit for shipment, and ordinary observation would discover that fact, it is the duty of the carrier to refuse the shipment, in order that the shipper may, if he can, conform the shipment to a fit condition for transportation; and, third, that the acceptance of a shipment for transportation, without qualification or dissent in respect of the fitness of its condition for that purpose, subjects the carrier to all the liabilities ordinarily attaching to an accepted shipment of the character to which that shipment belongs.

In this instance—that shown by the complaint and by plea 3—the character of the shipment, viz., live animals in a box or crate, and their natural propensity to escape confinement, were known to appellant's servants. The tender for transportation was of these animals, and not, primarily, of the box or crate which was but a means to conserve convenience of custody and handling and the safety of the animals within it. If the dog had been leashed with cords attached to a heavy block, there would have been, in principle, no difference. If that had been the means employed, the carrier could not, after acceptance of the shipment, have answered, when impleaded for the loss or injury of the animal, that the cord was too sleazy to serve the purpose, and hence that the shipper was negligent

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in that regard, with the result that he could not recover for the loss or injury. That this is true is demonstrated, we think, when the announcement of duty in *Central R. R. v. Smitha & Chastain*, by way of approving quotation from *Penn v. B. & E. R. R. Co.*, 49 N. Y. 204, 10 Am. Rep. 355, is considered, viz.: “* * * They are not insurers of animals against injuries to animals arising from their nature and propensities, *and which could not be prevented by foresight, vigilance, and care.*” (Italics supplied.)

It will be observed that this court did not conclude, in the quotation, to the common carrier's exoneration solely upon the ground that the injury arose from the nature and propensity of the animal. That, alone, will not suffice to exonerate the carrier in case of loss to a live animal after acceptance for transportation. The natural propensity of the animal that may lead to injury or loss must be anticipated “by foresight, vigilance and care,” if the transportation thereof is undertaken. The very statement of the rule of duty—to exonerate—precludes any right of the carrier to transfer the consequences of its neglect in this regard to the shipper. *Hannibal R. R. v. Swift*, supra. Being bound in duty, as *Central R. R. v. Smitha & Chastain* defines it, it would be obviously illogical—an immediate qualification of the duty declared—to close the responsibility of the carrier for restraint thereof against natural propensity to escape when the shipper tenders and the carrier accepts a live animal, boxed or crated, for transportation. The carrier may, in a proper case, refuse a shipment where in unfit condition for transportation. If so, it must be a necessary consequence that, having accepted the shipment, as tendered, its duty is unmodified by the character, sufficiency or insufficiency, open to observation, of the packing of the shipment so received for transportation. It follows, of course, that the insufficiency of the crate or box from which the dog escaped, for the purpose here disclosed, was not negligence exonerating this carrier. There is no such thing as contributory negligence in cases of this character (*McCarthy v. L. & N. R. R. Co.*, 102 Ala. 193, 14 South. 370, 48 Am. St. Rep. 29) for the satisfactory reason that if negligent at all in the loss of or damage to goods committed to a common carrier for its service the carrier is liable, the plea of contributory negligence being one of confession and avoidance.

The demurrer to plea 3, on the theory respectively asserted and denied by counsel, was properly sustained. On like considerations to those inducing our conclusion as respects plea 3, the demurrer to replication 2 was well overruled.

A careful review of the evidence, especially with reference to the material averments of plea 2, which counsel for appellant insist were proven without dispute, does not convince this

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court that the court below (the trial was without jury) reached an erroneous conclusion as upon the facts and circumstances in evidence.

The allegation in the complaint of the sum paid was under videlicet, and hence the insistence, for appellant, of variance in respect of the sum alleged and that proven cannot prevail.

The judgment is affirmed.

Affirmed.

DOWDELL, C. J., and SIMPSON and MAYFIELD, JJ., concur.

GULF & C. RY. CO. v. FERGUSON-MCKINNEY DRY GOODS CO.
(Supreme Court of Mississippi, June 27, 1910. Suggestion of Error
Overruled July 4, 1910.)

[52 So. Rep. 797.]

Carriers—Action—Loss of Goods by Fire—Negligence—Burden of Proof.*—In a suit against a railroad company for loss of goods by fire in its depot, held, that the burden of proof was on the plaintiff to show that defendant was guilty of negligence.

Carriers—Carriage of Goods—Termination of Liability—Reasonable Time for Removal of Goods by Consignee.—The reasonable time after notice that must be allowed by a railroad company for a consignee to remove his goods from its depot applies to every one alike, regardless of the consignee's distance from the depot.

Carriers—Carriage of Goods—Liability as Insurer—Termination of Liability—Time for Removal of Goods by Consignee.†—The liability of a carrier as the insurer of goods continues after their arrival at their destination, until notice to the consignee and until he has had a reasonable time in which to remove them.

Carriers—Carriage of Goods—Termination of Liability as Insurer—Goods at Destination—Terms of Contract.‡—The liability of a carrier as insurer of goods after their arrival at their destination, until notice to the consignee and until he has had a reasonable time in which to remove them, may reasonably be said to be within the terms of the contract of carriage.

Carriers—Loss of or Injury to Goods—Question for Jury—Reasonable Time for Removal of Goods from Depot.‡—What is a reasonable time for the consignee to remove his goods from a carrier's depot is a question for the jury, with reference to one residing in the vicinity of such depot.

*See extensive note, 26 R. R. R. 298, 49 Am. & Eng. R. Cas., N. S., 298.

†See last foot-note of *Knight v. Southern R. Co.* (S. C.), 35 R. R. R. 393, 58 Am. & Eng. R. Cas., N. S., 393.

‡See last foot-note of *Knight v. Southern R. Co.* (S. C.), 35 R. R. R. 393, 58 Am. & Eng. R. Cas., N. S., 393.

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Appeal from Circuit Court, Pontotoc County; J. H. Mitchell, Judge.

Action by the Ferguson-McKinney Dry Goods Company against the Gulf & Chicago Railway Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

The appellee sold certain goods to Phillips & Murff, merchants, at Reids, Miss., 20 miles from Pontotoc, and delivered the goods to the carrier for transportation, and they were transported to Pontotoc, Miss., a station on appellant's railway, where Phillips & Murff received their freight. They arrived at Pontotoc about February 12th, and on the night of February 14th the depot and warehouse were destroyed by fire, and the goods in question totally destroyed. There is no evidence as to the origin of the fire, and no proof of any negligence on the part of the railroad company. There is a conflict in the testimony as to whether or not Phillips & Murff were notified of the arrival of the freight; the agent testifying that notice had been sent to the consignees, which they denied receiving. Appellee brought suit against the railroad company for the value of the goods, and from judgment in its favor this appeal is prosecuted.

Flowers, Fletcher & Whitfield, for appellant, cite the following authorities: *Columbus & W. Ry. Co. v. Ludden*, 89 Ala. 612, 7 South. 471; *Hutchinson's Carriers*, § 377; *Railroad Co. v. Wood*, 66 Ala. 172, 41 Am. Rep. 749; *Railroad Co. v. Oden*, 80 Ala. 41; *Moses v. Railroad Co.*, 32 N. H. 523, 64 Am. Dec. 381.

Mitchell & Roberson, for appellee.

MAYES, C. J. Out of the many contentions made by appellant, we find only two that we deem necessary to notice. There is proof in this record only that appellee's goods were destroyed by being burned while in appellant's depot. There is not the slightest proof that this fire was the result of any negligence on the part of the agents of appellant. Notwithstanding this, the court instructed the jury "that, if they should believe from the evidence that the loss of the goods occurred because of the negligence of defendant, then they will find for plaintiff, even though they may think the liability of the railroad company had ceased as a common carrier." This instruction sought to hold the appellants liable as warehousemen, in the face of the fact that they had fully accounted for the failure to turn over the goods, within the rule laid down in the case of *Y. & M. V. R. R. Co. v. Hughes*, 47 South. 682. In the above case it was held that "in an action against a warehouseman for the value of the goods destroyed in a fire which burned the warehouse, the burden is on the bailor, in the absence of proof as to the

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circumstances of the fire, to show that it resulted from the bailee's negligence." The court also said: "We intimate nothing as to the quantity of proof as to negligence which will suffice to warrant the submission of this case to the jury, or which will call for an explanation by defendant." The facts of this case now on trial bring it within the rule announced above.

The court further erred in giving the fourth instruction asked for by appellee. This instruction told the jury that appellee should have a reasonable time to remove the goods from the depot, and in determining what was a reasonable time the jury might "take into consideration the distance Phillips & Murff would have to come after the goods." The liability of a railroad company as common carrier is widely different from its liability as a warehouseman after the goods have reached their destination. The liability in each case is the same as to all persons, no matter how near or remote the consignee may be to the place of delivery. If a party have his place of business distant from the depot of the railroad, he cannot, by reason of this fact, force upon the railroad a greater liability in the handling of his goods than would be incurred by the railroad in handling goods for one in close proximity. The liability of the carrier as insurer of the goods continues after arrival of the goods at their destination until notice to the consignee and until the consignee has had a reasonable time in which to remove his goods. All these things may reasonably be said to be within the terms of the contract of carriage. But the rule is not varied in any way by any question as to how far, or how near, the consignee may reside from the place to which he had his goods consigned. What is a reasonable time for the consignee to remove the goods is necessarily a question of fact, and must be largely left to the jury; but it is to be determined with reference to what would be a reasonable time, as applied to one residing in the vicinity of the place of delivery. For authorities we refer to appellant's brief, and to the notes under 5 Ency. Law (2d Ed.) p. 263, par. (c).

Reversed and remanded.

SOUTHERN RY. CO. *et al.* v. JONES COTTON CO.

(Supreme Court of Alabama, Feb. 3, 1910. Rehearing Denied June 30, 1910.)

[52 So. Rep. 899.]

Carriers—Carriage of Goods—Agent of Carrier—Negligence.—A railway company had an arrangement with a compress company, by which on delivery to the railway company by the owner of cotton of the compress company's warehouse receipts the railway company issued bills of lading for the shipment of the cotton. Plaintiff cotton company, after contracting for the sale and delivery of cotton which it had delivered to the compress company, delivered the warehouse receipts of the compress company to the railway company and bills of lading were issued by the railway company thereon. Held, that the railway company recognized the compress company as its agent to keep the cotton, pending its loading into the cars, and became responsible for the compress company's negligence therein.

Words and Phrases—"Reconditioned."—Cotton in a bale is "reconditioned" by loosening the ties, removing the packing, and pulling or picking the damaged part of the cotton from the outside of the bale.

Carriers—Carriage of Goods—Liability for Damages.—Where the owner of cotton delivers to a railway company the warehouse receipts of a compress company, and the railway company accepts them and issues bills of lading thereon to the owner, and the cotton is injured by exposure to the weather after delivery to the compress company, both the railway company and the compress company are liable for the loss, the railway company because it occurred while in the hands of its agent, the compress company, and the compress company being liable as a bailee for the owner, and its liability to the owner could not be defeated by its accepting the cotton in bailment from the railway company.

Carriers—Carriage of Goods—Damages—Right of Recovery—"Landed."—Plaintiff, cotton company, delivered cotton to a compress company and subsequently delivered the warehouse receipts of that company to a railway company and received in exchange bills of lading. The cotton company shipped the cotton over the railway line to a purchaser under a contract requiring that the cotton should be delivered in good condition to the purchaser's mills "landed," and drafts for the purchase price with bills of lading attached were drawn by the cotton company on the purchases and honored before the cotton was delivered at its destination. Held, that "landed" meant that the cotton company was responsible for the entire shipment of cotton and for damages to it until delivered at the point of destination, and therefore the right of recovery for

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damages to the cotton resulting from exposure to the weather while in the possession of the compress company was in the cotton company, although it had not been called on to repay any of the purchase price.

Damages—Destruction of Goods—Measure of Damages—Advance in Price.—In an action against a carrier for damages to cotton shipped, the bill alleged that, by reason of the loss of the cotton, complainant was unable to deliver, according to a contract of sale, except by furnishing other cotton which could be furnished at an advanced price only, and the bill attempted to make the difference between the contract price and the advanced price the basis of recovery. Held, that complainant was entitled to be reimbursed for the cotton destroyed, even though there was no evidence that it purchased other cotton with which to replace the cotton destroyed, and a decree which allows for the loss of cotton and which makes no allowance for the loss occasioned by advance in price is proper.

Bailment—Termination—Delivery to Carrier.—Where a shipper delivered cotton to a compress company and then, in accordance with arrangements between the compress company and a railroad company, delivered the compress company's receipts to the railroad company, and received bills of lading, neither the contract between the shipper and the railroad company for carriage nor the assignment of that contract to a consignee of the cotton, will affect the right of the shipper to have the compress company deliver the cotton to the railroad company, and a constructive delivery to the railroad company will not be sufficient to relieve the compress company of liability to the shipper.

Appeal from Chancery Court, Morgan County; W. H. Simpson, Chancellor.

Action by the Jones Cotton Company against the Southern Railway Company and others. Judgment for plaintiff, and defendants appeal. Modified and affirmed.

See, also, 157 Ala. 32, 47 South. 251.

Paul Speake, for appellant Southern Ry. Co. *Brown & Kyle*, for appellant Gulf Compress Co.

Callahan & Harris, for appellee.

SAYRE, J. When this case was here on a former occasion (157 Ala. 32, 47 South. 251) the equity and frame of the bill were settled in favor of the complainant. The present appeal raises only the question of the liability of the defendants for certain items charged against them in the decree. First, then, with reference to the two lots of cotton, 54 bales marked "O. S. T.," and 50 bales marked "E. W. L." The decree was that the Southern Railway Company should respond to the complainant for the actual loss in weight sustained by this cotton while in the possession of the Gulf Compress Company as the

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agent of the said railway company, and that the Gulf Compress Company was liable for the diminution in value of 34 bales of the "O. S. T." cotton, and 21 bales of the "E. W. L." cotton on account of its being reconditioned and repacked while in storage with the compress company. This cotton had been stored by the cotton company with the compress company. The railway company had an arrangement with the compress company, evidenced by formal writing, by which, on delivery to it by the owner of warehouse receipts issued by the compress company, it issued bills of lading for the shipment of cotton whenever occasion arose. The compress company agreed to keep all cotton insured for the benefit of the railway company after the issuance of such bills of lading and until it should be loaded into the cars of the railway company, and to hold the railway company harmless against any damage which such cotton might sustain while in its possession pending shipment. The cotton company having contracted for the sale and delivery of the cotton in controversy to purchasers in North Carolina, and with the railway company for its transportation thither, delivered its warehouse receipts to the railway company and received bills of lading for the cotton. Thereby the railway company recognized the compress company as its agent to keep the cotton pending its loading into the cars and became responsible for the compress company's negligence therein.

Between the time when the railway issued its bills of lading and the time when the cotton was loaded on the cars for transportation to the consignees a considerable period elapsed, the delay in shipment being caused in part at least by the fact that when the compress company tendered the cotton to the railway company, it was found to have been damaged by exposure to the weather so that the railway company refused to receive it from the compress company. This made it necessary for the cotton to be reconditioned and in part repacked. Cotton is "reconditioned" by loosening the ties, removing the bagging, and pulling or picking the damaged part of it from the outside of the bale. Where the bales are much reduced by this process, as we gather, the reduced bales are combined into new bales by repacking. Mere repacking injures the quality of the cotton put into the repacked bales and affects its value in the market. The chancellor evidently found that the cotton had suffered damage by exposure to the weather subsequent to the issue of the bills of lading. The testimony has been closely scrutinized, and we find no sufficient reason to challenge the correctness of that conclusion. The reconditioning and repacking were also done subsequently to the issue of the bills of lading by the railway company, and most certainly account for the loss in weight of the two lots. The processes

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damages to the cotton resulting from exposure to the weather while in the possession of the compress company was in the cotton company, although it had not been called on to repay any of the purchase price.

Damages—Destruction of Goods—Measure of Damages—Advance in Price.—In an action against a carrier for damages to cotton shipped, the bill alleged that, by reason of the loss of the cotton, complainant was unable to deliver, according to a contract of sale, except by furnishing other cotton which could be furnished at an advanced price only, and the bill attempted to make the difference between the contract price and the advanced price the basis of recovery. Held, that complainant was entitled to be reimbursed for the cotton destroyed, even though there was no evidence that it purchased other cotton with which to replace the cotton destroyed, and a decree which allows for the loss of cotton and which makes no allowance for the loss occasioned by advance in price is proper.

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Between the time when the railway issued its bills of lading and the time when the cotton was loaded on the cars for transportation to the consignees a considerable period elapsed, the delay in shipment being caused in part at least by the fact that when the compress company tendered the cotton to the railway company, it was found to have been damaged by exposure to the weather so that the railway company refused to receive it from the compress company. This made it necessary for the cotton to be reconditioned and in part repacked. Cotton is "reconditioned" by loosening the ties, removing the bagging, and pulling or picking the damaged part of it from the outside of the bale. Where the bales are much reduced by this process, as we gather, the reduced bales are combined into new bales by repacking. Mere repacking injures the quality of the cotton put into the repacked bales and affects its value in the market. The chancellor evidently found that the cotton had suffered damage by exposure to the weather subsequent to the issue of the bills of lading. The testimony has been closely scrutinized, and we find no sufficient reason to challenge the correctness of that conclusion. The reconditioning and repacking were also done subsequently to the issue of the bills of lading by the railway company, and most certainly account for the loss in weight of the two lots. The processes

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here mentioned, after the cotton had been damaged by exposure, did not cause further damage to the cotton as a whole, but were resorted to, and had the affect, beyond doubt, to increase the value of the cotton as a whole although it diminished the value per pound of so much of it as was put into the repacked bales. But the loss in weight of the entire lot and the loss of value in the cotton repacked together represent the total loss suffered by the cotton, and these elements of loss must alike be referred to its damage by exposure as its proximate cause. For this loss the defendants were both liable to the complainant, the railway company for the reason already indicated, the compress company for the reason that it was bailee for the complainant, and by accepting bailment from the railway company could not defeat the rights of the true owner. The defendants were jointly liable to the complainant for the entire loss to the cotton, and a decree might well have been made against them both for the entire amount of the loss, though there could be, of course, one satisfaction only. Neither appellant is in a position to complain of a decree the error of which consists in charging each appellant with a lesser sum than its liability as measured by law. The appellee has contented itself with the decree in its present shape.

It is denied by appellants that the right of recovery resides in the cotton company. This denial is grounded upon the fact, itself not denied by appellee, that drafts with bills of lading attached were drawn by appellee company on the consignees and honored by payment before the cotton was delivered at its destination. These drafts were for the stipulated price of the cotton estimated at its original weight and quality. The cotton company does not appear in the evidence to have been called on for restitution of any part of the sum realized from the drafts. Prima facie the delivery of a bill of lading by the consignor to the consignee operates as a transfer of title in the goods shipped, and an action against the carrier for loss or damage while in its possession will lie only at the suit of the consignee; but if the consignee is not in fact the owner and the goods while in transit are at the risk of the consignor, the right of action resides in the latter. *Louisville & Nashville R. R. Co. v. Allgood*, 113 Ala. 163, 20 South. 986. Any proper rule must require that the suit be brought by that party at whose risk the goods are while in course of transportation. The evidence shows without dispute or contrary inference that the contract of purchase required that the cotton should be delivered in good condition to the mills in North Carolina "landed." In the terminology of the trade, "landed" meant that the consignor was responsible for the cotton and for damages to it until delivered at the point of destination, meaning, of course, delivery at destination of the entire shipment in the stipulated condi-

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tion. The appellant Gulf Compress Company contends that the cotton shipped was landed. And so some of it was in a way, but appellant will hardly contend that the cotton destroyed and cast away while in its hands, aggregating approximately 16 bales, was landed in any sense, or that the remainder was landed as it ought to have been. Thus the railroad company continued to be the agent of the consignor in caring for the cotton at the time of the loss, as it had been constituted in the beginning by the bill of lading in which plaintiff was both consignor and consignee, and with this status payment and delivery of the bills of lading were not inconsistent. This fact brings the complainant within the reason of the rule, and establishes its right to maintain this bill. It is of no concern to the appellant companies that the complainant has a sum of money which in equity and good conscience belongs to the consignees, if that be the case. That is an equity which concerns the consignees only; nor is there a necessary dependence between it and the legal in controversy. Certainly the right of complainant to recover against the compress company as its bailee not for carriage, but for care, cannot be affected by equities which have arisen between complainant and the mill owners although they have arisen out of dealings in the identical cotton.

The argument that there was a variance between allegation and proof is based upon a misconception of the record. We quote the allegation of the third paragraph of the bill: "And orator avers that it had entered into a contract to sell a large number of bales of cotton to the Proximity Manufacturing Company of Greensboro, N. C., under which contract it was obligated to deliver said cotton in good condition 'landed,' which term signified, and is so understood by persons dealing in cotton, that your orator was to deliver the cotton to the said Proximity Manufacturing Company on the ground at Greensboro, N. C." The same contract is alleged in respect to the shipment to O. P. Heath & Co., of Charlotte, N. C. The testimony of the witness Wall supported the contract alleged, and that without dispute.

Complaint is further made of the decree that there was a failure of proof to establish it in part at least in this: The bill alleged, in substance, that by reason of the loss of the cotton, complainant was unable to deliver according to contract except by furnishing other cotton which could be purchased at an advanced price only. The bill seeks to make this the basis of a recovery of the difference between the contract price and the advanced price of cotton to replace that destroyed. It is said that there is no evidence in the record that complainant purchased other cotton with which to replace the cotton destroyed. But it occurs to us that, whether so or not, complainant is entitled to be reimbursed for the cotton destroyed, while as to

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the further loss occasioned by the advance in price, no relief was decreed.

The compress company cannot complain that liability was fastened upon the railroad company by secondary evidence of the contract between complainant and the North Carolina parties, if that was the case. The compress company was charged as complainant's bailee, as we have already indicated, not for carriage, but as a warehouseman. We think there can be no sufficient reason for holding that by its contract with the railroad company for carriage, or by the assignment of that contract to the North Carolina parties, the complainant company lost the right to have the compress company deliver the cotton to the railroad company for carriage in amount and condition as when received by the compress company. Nor did a constructive delivery to the railroad company meet the ends to be served by an actual delivery. It charged the railroad company, but did not relieve the compress company. The result obtained by the decree was in accordance with the theory of the bill, the proof, and the principles of equity. The briefs disclose a recurrence to the idea, advanced when this cause was here on the former appeal, that different causes of action against different defendants are joined in the decree. But that was discussed and decided on that appeal satisfactorily to the court, and we will not again go into it. The railroad company has not complained of the character of the evidence offered. The compress company has no reason to complain.

Appellant compress company was erroneously charged with one of the two bales of cotton referred to in evidence as "M. 131" and "W. 18." We think that one of these two bales was traced into the possession of the compress company, while the other was not, but we are unable to say from the evidence in the record with reasonable satisfaction which one. In this state of the proof the least valuable bale must be charged against the compress company. Its value must, of course, be proved before the register.

The chancellor's decree of reference will be corrected so as to direct the register to charge the least valuable of the two bales marked "M. 131" and "W. 18" against the compress company, and, as corrected, will be affirmed.

The costs of this appeal will be taxed against the appellants equally. We cannot anticipate that other costs will not be properly taxed in the chancery court. As yet no decree for costs has been made there. Affirmed.

KIRK *v.* SEATTLE ELECTRIC CO.

(Supreme Court of Washington, May 5, 1910.)

[108 Pac. Rep. 604.]

Carriers—Street Car Passenger—Disobedience of Rules—Effect as to Right to Transfer.*—A rule forbidding passengers riding on the front platform of a street car is reasonable, and where a passenger refused to obey the same, he thereby lost his rights as a passenger, and was not entitled to a transfer, so that on entering a second car he was not entitled to ride without paying a second fare.

Carriers—Street Car Passenger—Power to Withhold Transfer—Method of Testing.—A street car passenger desiring to test the company's power to withhold a transfer from him, or to refuse him carriage without payment of another fare on a second car, should have withdrawn when the company asserted its position adverse to his claim to a transfer, and tested his rights in the courts, and should not have remained on the car without paying fare, and invited application of force to eject him.

Carriers—Ejection of Street Car Passenger—Failure to Pay Fare or Present Transfer.†—A street car conductor is justified in demanding that a passenger pay his fare or present a transfer, and need not accept his contention that he is already a passenger because of payment of the first fare, and, failing and refusing to do that, he has no lawful right to passage, and the conductor is justified in ejecting him.

Carriers—Ejection of Passenger—Force Which May Be Used.‡—A street car conductor, justified in ejecting a passenger, is only protected in the use of necessary force, beyond which the company must answer for his act, and the amount lawfully within his right must be measured by the stubbornness of the passenger's resistance.

Carriers—Ejection of Passenger—Necessary Force—Determination by Court or Jury.—Neither the court nor jury should be required to weigh with too much nicety the amount of force necessary to eject in the face of offered resistance.

*For the authorities in this series on the subject of the validity of a carrier of passenger's rules and regulations, see first foot-note of *St. Louis, etc., R. Co. v. Johnson* (Okl.), 36 R. R. R. 165, 59 Am. & Eng. R. Cas., N. S., 165.

For authorities on the subject of street car transfers, see note at end of case.

†For the authorities in this series on the subject of the right to eject passengers on account of failure to tender valid ticket or transfer and refusal to pay fare, see last paragraph of first foot-note of *St. Louis, etc., R. Co. v. Johnson* (Okl.), 36 R. R. R. 165, 59 Am. & Eng. R. Cas., N. S., 165; fourth head-note of *Anderson v. Louisville & N. R. Co.* (Ky.), 34 R. R. R. 220, 57 Am. & Eng. R. Cas., N. S., 220; *Texas & P. Ry. Co. v. Diefenbach et al.* (C. C. A.), 33 R. R. R. 213, 56 Am. & Eng. R. Cas., N. S., 213.

‡For the authorities in this series on the subject of the right to

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Carriers—Payment of Passenger's Fare—Offer by Third Person—Necessity of Acceptance.§—It is immaterial to the carrier from whom it receives a fare, and, if another than the passenger offers to pay, it is the same as if the passenger himself offers to do so, and the conductor is bound to accept, but such payment must be acquiesced in by the passenger, either by express or silent assent.

Carriers—Ejection of Passenger—Tender of Fare by Others.—An ejected passenger who did not tender his fare, and expressly repudiated a tender of his fare by others, cannot claim any benefit from their offers.

Evidence—Opinion Evidence—Action for Assaulting Passenger.—In an action for assault in ejecting plaintiff from a street car, he was permitted to interrogate witnesses as to expressions of sympathy on the part of the passengers, and that he appealed to them to determine his action, and they insisted on his remaining. Held, that questions of this character, irrespective of the answers, should not have been allowed, as they called for expressions of opinions, which were not competent and could not be testified to by either the speaker or the hearer.

Witnesses—Impeachment—Immaterial and Collateral Matters.—In an action for assault in ejecting plaintiff from a street car, it was error to permit him to impeach a motorman in regard to his testimony as to his age, as such matter was immaterial and collateral.

Evidence—Opinion Evidence—Extent of Damages.—In an action for personal injuries, it was error to permit plaintiff to give his opinion of the monetary extent of his damages.

Damages—Personal Injuries—Evidence—Statement of Expense.—In an action for assault, plaintiff was permitted to introduce an itemized statement of the expenses of himself and wife while traveling over the country for over a year, including railway fares, meals, sleeping car berths, and board bills, from Seattle to Los Angeles, Columbus, Ohio, and other places, amounting to nearly \$1,000. Held, that this was error, as it included items that could not be properly characterized as damages naturally and proximately flowing from injuries complained of, though if, on advice of his physician, he went to Los Angeles to subject himself to conditions which were necessary and proper for his recovery, necessary transportation and other expenditures which would not have been incurred at home would be proper elements of damage, as would be like expense of his wife, if his condition was such that he could not make the trip alone.

Damages—Personal Injuries—Loss of Profits.—Where loss of

use force in ejecting passengers from trains or street cars, see first foot-note of *Texas & P. Ry. Co. v. Diefenbach et al.* (C. C. A.), 33 R. R. R. 213, 56 Am. & Eng. R. Cas., N. S., 213; first foot-note of *Birmingham, etc., Co. v. Yielding* (Ala.), 30 R. R. R. 285, 53 Am. & Eng. R. Cas., N. S., 285.

§See second foot-note of *Louisville & N. R. Co. v. Cottengim* (Ky.), 25 R. R. R. 659, 48 Am. & Eng. R. Cas., N. S., 659.

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profits are based on an estimate of what could have been earned had plaintiff been in good health and earning power, they become speculative and remote, and are not recoverable in an action for personal injuries, but the proper element of damage in such cases is loss of earning power, if any.

Damages—Personal Injuries—Loss of Earning Power—Determination.—The loss of earning power as an element of damage in a personal injury case can be arrived at by determining what plaintiff was capable of earning before and after his injury.

Damages—Personal Injuries—Estimated Profits and Commissions in Business.—In an action for personal injuries, estimates of profits and commissions in plaintiff's business, of assisting in getting out special editions of newspapers, his commissions depending on the financial success of the venture, are too speculative and remote.

Department 1. Appeal from Superior Court, King County; Boyd J. Tallman, Judge.

Action by John W. Kirk against the Seattle Electric Company From a judgment for plaintiff, defendant appeals. Reversed.

James B. Howe and *A. J. Falknor*, for appellant.

Charles A. Riddle and *Wm. M. Watson*, for respondent.

MORRIS, J. In this action respondent sought damages for injuries sustained in an assault, claimed to have been committed upon him October 2, 1907, by appellant's servants in charge of its car No. 530. The theory of the complaints is that respondent was a passenger, having paid his fare upon car No. 311; that the passengers upon car 311 were transferred to car 530 and transfers issued to them, but that a transfer was refused respondent and, upon entering the second car, he became entitled to carriage without additional payment of fare. The conductor of the second car refused to carry him without a fare, and, when payment was refused, he alleges he was set upon by the conductor and motorman and severely beaten. He also sets forth that, at the request of the conductor of the second car, he was arrested and taken to the police station, where no charge being made against him he was discharged. The answer sets forth a rule of the company forbidding passengers from riding upon front platforms of cars; that respondent refused to obey such rule when his attention was called to the same, but insisted upon remaining upon the front platform, and that the car was finally run into appellant's car barn, and all the passengers thereon transferred to the second car, except appellant who was refused a transfer, upon the theory that, having violated a reasonable rule of the company and refusing to abide thereby, he forfeited his rights as a passenger, and was not entitled to a transfer upon car 530; that immediately upon entering the second car, he was informed that he could not ride thereon with-

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out the payment of fare, which he refused, and the employees of the company thereupon undertook to eject him, using no more force than was necessary for that purpose, and, being unable to do so, called a policeman to remove him. This affirmative matter being denied, the case went to the jury upon the issues thus raised, and a verdict was returned awarding respondent \$6,609. A new trial being denied, the case is brought here for review.

Many questions are presented upon the appeal, it being contended, first, that a demurrer should have been sustained to the complaint, upon the ground that several causes of action were improperly united. There was but one cause of action pleaded—that for assault. The allegation for the subsequent arrest was no part of this cause of action, nor was it the setting forth of a second cause of action. Had the complaint been moved against upon this ground, the reference to the subsequent arrest would doubtless have been stricken. It was, however, good as against a demurrer, in that it was not set forth as an independent cause of action and then improperly united with the first cause of action pleaded.

Upon the main issue involved, as to the relative rights of the parties, we deem the law well settled. The rule forbidding passengers riding upon the front platform was a reasonable one, and it was the duty of respondent to obey the same when his attention was called to it, and, if he willfully refused to be bound by the rule and enter the body of the car; he thereby lost his rights as a passenger, and the company was not required to issue a transfer to him. Upon entering the second car he was not entitled to ride thereon without the payment of a second fare, and, upon demand being made, he should have complied; or if, as there is some evidence to indicate, he desired to test the power of the company to withhold a transfer from him or to refuse him carriage without the payment of another fare upon the second car, was his duty to withdraw when the company asserted its position, and test his rights in the courts. There was no need, and it was an imprudent act on his part, to insist upon remaining upon the car without the payment of fare, and thus invite the application of force to eject him. The proper way for him to test the question if he desired to do so was in the lawful and peaceable procedure of the courts, and not in opposing strength to strength, and permitting the superior force to determine the rights involved. When respondent entered the second car, and thus indicated his purpose to seek carriage thereon, the conductor was justified in demanding that he pay his fare or present a transfer. The conductor was under no duty to accept his contention that he was already a passenger because of the payment of the first fare. Respondent could only lawfully continue upon the car by paying fare or produc-

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ing a transfer. Failing and refusing to do that, he had no lawful right to passage, and the conductor was justified in ejecting him. In doing so, however, he would only be protected in the use of necessary force. Going beyond that the company must answer for his act. The amount of force lawfully within the right of the conductor must be measured by the stubbornness of respondent's resistance. He had the right to use such force as was necessary to overcome respondent's resistance, and to remove him from the car, and while the amount of force lawfully to be used in the accomplishment of such removal is dependent upon the force used in resisting it, the measurement of force with force with exactness is a difficult problem for either court or jury, and hence it has become established that neither court nor jury should be required to weigh with too much nicety the amount of force necessary to an ejection from the car in the face of the resistance offered. *Clark v. Great Northern Ry. Co.*, 37 Wash. 537, 79 Pac. 1108.

This, then, was the issue to be submitted to the jury: Did the employees of the company, in their endeavor to eject respondent from the car, use and employ more force than was necessary to overcome the resistance offered by respondent, accompanied by proper instructions as to the rights of the parties as herein indicated? Respondent contends that, while he did not personally offer to pay his fare, other passengers proffered a fare for him. It is immaterial to the company from whom it receives its prescribed fare. If another offered to pay respondent's fare, it was the same as if respondent himself had offered to do so, and the conductor would be bound to accept it. *Louisville & N. R. Co. v. Garrett*, 76 Tenn. 438, 41 Am. Rep. 640. But such payment on the part of others must be acquiesced in by those in the position of respondent, either by an express assent or by silence which will be construed as an acceptance. *Gates v. Quincy, O. & K. C. Ry. Co.*, 125 Mo. App. 334, 102 S. W. 50.

In the record before us, it appears that, when tenders of fare were made by outsiders, the respondent said to them: "Don't pay my fare for me. I paid my fare and I am entitled to ride home." Respondent, having thus expressly repudiated such payment, cannot thereafter claim any benefit from the offers. This rule is likewise subject to this additional modification: Such offer on the part of others or on the part of those whom it is sought to eject must come before the attempted ejection. In *Hoffbauer v. D. & N. W. R. Co.*, 52 Iowa, 342, 3 N. W. 121, 35 Am. Rep. 278, it is said: "The rule that a passenger may test the regulations of the company and the firmness of the conductor by refusing to pay full fare, and still save himself from expulsion by tendering full fare after expulsion had commenced,

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is not only uncalled for for the just protection of the recusant passenger, but would tend to encourage a practice which if indulged in would interfere with the convenience of the company and the dispatch and quiet to which other passengers are entitled." A like rule is announced in *O'Brien v. N. Y. Cent. & H. R. R. Co.*, 80 N. Y. 236, and *Pease v. D. L. & W. R. R. Co.*, 101 N. Y. 367, 5 N. E. 37, 54 Am. Rep. 699. Hutchinson on Carriers (3d Ed.) § 1085, thus cites the rule, and gives many authorities in support: "The prevailing rule and the one supported by the better reason is that, even though he may once have refused to pay his fare or show his ticket, he may at any time before the process of ejection is begun comply with the demand and continue his journey on that train; but that where he so refuses and persists in his refusal, after being accorded reasonable time and opportunity to comply, until the conductor has the right, and it is his duty to eject him, and the conductor has begun the process of ejection either by stopping the train or applying force to the passenger when necessary, the passenger thereupon forfeits his rights as a passenger and his ejection may be completed even though he may thereafter tender the performance demanded." No error was committed by the court below in its instructions upon these rules of law of which we have been speaking, but inasmuch as they are involved in determining the respective rights of the parties, and we have decided to grant a new trial for errors committed, we have thought it best to consider them in order to simplify and determine the rules which should govern the court in the new trial.

Respondent was permitted to interrogate witnesses as to expressions of sympathy on the part of the passengers, and that he appealed to them to determine his action, and that they insisted on his remaining. This was clearly error. Questions of this character, irrespective of the answers, should not have been allowed, as they called for expressions of opinions on the part of the passengers, which were not competent, and could not be testified to by those expressing such sentiments or by those who heard them.

Respondent was also permitted to impeach the motorman of the first car in regard to his testimony as to his age. This was error. The age of the first motorman was an immaterial matter, and there was no necessity for any inquiry in regard to it. It was clearly a collateral matter, and, if respondent was permitted to cross-examine the witness as to his age, he was bound by his answer and could not subsequently impeach him. It is too well established to require citation that a witness may not be impeached in a collateral matter.

Respondent was permitted to give his opinion of the monetary

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extent of his damages. This was also error. It was for respondent to give to the jury the character of his damage, but it was for the jury to determine its extent and fix the compensatory amount of his loss.

Respondent was also permitted to give to the jury an itemized statement of the expenses of himself and wife while traveling over the country for over a year, including railway fares, meals, sleeping car berths, and board bills, from Seattle to Los Angeles, Columbus, Ohio, and other places, amounting to the sum of \$964. This was error, as the itemized bill manifestly included items that could not be properly characterized as damages naturally and proximately flowing from the injuries complained of. If, upon the advice of his physician, respondent went to Los Angeles to subject himself to conditions which were necessary and proper elements in his recovery, the necessary transportation and other expenditures of the trip, incurred for items which would not have been included in his necessary expenditure had he remained at home, would be proper elements of damage. The like expense of his wife, if respondent's condition was such that he could not make the trip alone, would also be an item of damage. Such, also, would be the amounts necessarily paid for medicine and medical attendance. To such extent only were the items included in the expense statement admissible.

The court charged the jury that the respondent was entitled to recover for "loss of profits, commissions, and pecuniary rewards, by reason of said injuries." This was error, as under the evidence such profits and commissions were highly speculative in their nature. There may be cases where there can be a recovery for loss of profits where, by reason of some definite contract, such profits can be definitely ascertained, but where as in this case they are based upon an estimate of what could have been earned had respondent been in good health and earning power, they become speculative and remote and are non-recoverable. The proper element of damage in cases of this character is loss of earning power, if any. If, by reason of his injuries respondent's earning capacity was diminished, the extent of such diminution was a proper element of recovery, and could be arrived at by determining what he was capable of earning before and after his injury. But estimates of profits and commissions in his business, which was that of assisting in getting out special editions of newspapers in all sections of the country, respondent's commissions depending upon the financial success of the venture, were altogether too speculative and remote.

Other errors are assigned in the instructions of the court,

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but what has heretofore been said is determinative of them, and there is no necessity for special reference to them.

The judgment is reversed, and the cause remanded for a new trial.

RUDKIN, C. J., and FULLERTON, CHADWICK, and GOSE, JJ., concur.

Note.**STREET CAR TRANSFERS.**

- I. Power to Require Issue of Transfers, 503.
 - a. Included in Power to Fix Maximum Fare, 503.
 - b. Transfers between Lines Two Hundred Feet Apart—City's Power to Regulate, 503.
 - c. Establishment of Additional Line—Right to Second Fare—Impairment of Contract Obligations, 504.
 - d. Application of Contract with City—Territory Subsequently Annexed, 504.
 - e. Duty of Assignee of Franchise to Interchange Transfers with Its Assignee from and to Its Remaining Lines, 504.
 - f. Application of Statute—Beneficial Owner of Railway Lines, 505.
 - g. Application of Ordinance—Intersecting Lines—Portions of Line Owned by Different Companies, 505.
 - h. Ordinance—Contractual Obligations, 505.
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 - a. Refusal to Give Transfer a Refusal to Carry, 506.
 - b. Ordinance—Right to Ride to End of Line—Completion of Contract, 506.
 - c. Custom to Issue Transfers Not Required by Statutes, 506.
 - d. Custom to Give Transfers at New Intersection—Application of Carrier's Rule, 506.
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 - a. Time and Manner of Transportation—Power of Carrier to Regulate, 512.
 - b. Good "for a Continuous Ride"—Boarding Another Car below Issue Point of Transfer—Payment of Fare to Issue Point, 512.
 - c. Transfer Complete Evidence of Contract—Effect of Rule as to Place of Use—Notice, 512.
- VIII. Wrong or Defective Transfer Check, 512.
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 - (5) Transfer to Wrong Line—Not Required to Make Technical Examination, 514.
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 - (7) Effect of Condition on Check, 514.
 - (8) Time Limit—No Rights Acquired by Passenger through Failure to Read Check, 514.
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 - (3) Refusal to Give Transfer—Girl of Eleven Ejected—Darkness—Fright—Excessive Verdict, 520.
 - (4) Failure to Give Transfer—Ejection of Husband and Wife—Mud—Exemplary Damages, 521.

Cross-References to Preceding Authorities in This Series on Our Main and Kindred Subjects.

Duty to Afford Opportunity to Procure Tickets.—For the authorities in this series on the subject of the duty of carriers to afford opportunities to passengers to procure tickets, see second foot-note of *Talbert v. Charleston, etc., R. Co.* (S. C.), 17 R. R. R. 53, 40 Am. & Eng. R. Cas., N. S., 53.

Right to Eject Passenger Presenting Wrong or Defective Ticket.—For the authorities in this series on the subject of the right to eject a passenger who has a defective or wrong ticket and refuses to pay fare or additional fare, see last foot-note of *Anderson v. Louisville, etc., R. Co.* (Ky.), 34 R. R. R. 220, 57 Am. & Eng. R. Cas., N.

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S., 220; last head-note of *Mace v. Southern R. Co.* (N. C.), 34 R. R. R. 15, 57 Am. & Eng. R. Cas., N. S., 15; second foot-note of *Baltimore, etc., R. Co. v. Evans* (Ind.), 29 R. R. R. 609, 52 Am. & Eng. R. Cas., N. S., 609.

Street Railway Transfers.—For the authorities in this series on the subject of street railway transfers, see first paragraph of foot-note of *People v. Detroit United R. Co.* (Mich.), 32 R. R. R. 158, 55 Am. & Eng. R. Cas., N. S., 158, 118 N. W. 9.

Tender of Fare.—For the authorities in this series on the subject of tender of passengers' fares, see first foot-note of *Louisville, etc., R. Co. v. Cottongim* (Ky.), 32 R. R. R. 576, 55 Am. & Eng. R. Cas., N. S., 576.

Ticket Agents' Mistakes or Negligence—Liability of Carrier.—For the authorities in this series on the subject of the liabilities of carriers on account of mistakes or negligence of their ticket agents, see last foot-note of *Arnold v. Atchison, etc., R. Co.* (Kan.), 34 R. R. R. 217, 57 Am. & Eng. R. Cas., N. S., 217; third head-note of *Mace v. Southern R. Co.* (N. C.), 34 R. R. R. 15, 57 Am. & Eng. R. Cas., N. S., 15.

Waiver of Conditions of Ticket—Authority of Conductor.—For the authorities in this series on the subject of the authority of a conductor to waive the conditions of a passenger ticket, see last foot-note of *Baltimore, etc., R. Co. v. Evans* (Ind.), 29 R. R. R. 609, 52 Am. & Eng. R. Cas., N. S., 609; foot-note of *Johnson v. Michigan United Rys. Co.* (Mich.), 30 R. R. R. 346, 53 Am. & Eng. R. Cas., N. S., 346.

Wrong or Defective Tickets—Duty of Conductors with Respect to Explanations of Passengers.—For the authorities in this series on the subject of the duty of conductors to respect explanations of passengers as to causes of failure to have tickets or the proper tickets, see last paragraph of foot-note of *People v. Detroit United R. Co.* (Mich.), 32 R. R. R. 158, 55 Am. & Eng. R. Cas., N. S., 158, 118 N. W. 9.

Wrongful Ejection—Need Not Pay Second Fare and Sue to Recover It.—See foot-note of *Arnold v. Rhode Island Co.* (R. I.), 23 R. R. R. 414, 46 Am. & Eng. R. Cas., N. S., 414, 66 Atl. 60.

I. POWER TO REQUIRE ISSUE OF TRANSFERS.

a. INCLUDED IN POWER TO FIX MAXIMUM FARE.

The power of a municipality to fix the maximum rate of fare to be charged by a street railway company includes the power to provide for transfers where passengers are carried over two or more lines operated by one company. *Chicago Union Traction Co. v. Chicago*, 199 Ill. 484, 65 N. E. 470.

b. TRANSFERS BETWEEN LINES TWO HUNDRED FEET APART—CITY'S POWER TO REGULATE.

The enactment of the section of the Rev. Code of Chicago, as made

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in 1897, providing that the maximum rate of fare for one continuous passage on any line of a street railway company for any distance within the city limits shall be five cents, and that transfers shall be given where any such line connects with or comes within two hundred feet of any other line owned, leased or operated by the same company, was a valid exercise of the city's power to regulate street railway fares and transfers, and does not violate any provision of the constitution of the state. So held in *Chicago Union Traction Co. v. Chicago*, 199 Ill. 484, 65 N. E. 470.

c. ESTABLISHMENT OF ADDITIONAL LINE—RIGHT TO SECOND FARE—IMPAIRMENT OF CONTRACT OBLIGATIONS.

In *People v. Detroit United R. Co.* (Mich.), 33 R. R. R. 1, 56 Am. & Eng. R. Cas., N. S., 1, 121 N. W. 321, it is held that a provision in an ordinance granting a street railway franchise requiring the company to maintain two lines crossing each other at right angles and to give transfers, fixing the fare, and stipulating that the rates of fare shall not be reduced, which reserves to the city the right to make, by ordinance, reasonable rules to protect the interests of or accommodation and running of cars for the public, does not authorize the city to compel the establishment of an additional route, which route will be a combination of portions of both the original lines; and thereby compel an unnecessarily frequent schedule on part of the lines, or an infrequency of cars on others, and deprive the company of its right to collect a second fare from passengers transferring to other lines intersecting; and an ordinance making such a requirement would be void as violating the constitutional provision against impairing the obligation of a contract.

d. APPLICATION OF CONTRACT WITH CITY—TERRITORY SUBSEQUENTLY ANNEXED.

In *Indiana R. Co. v. Hoffman* (Ind.), 10 R. R. R. 281, 33 Am. & Eng. R. Cas., N. S., 281, 69 N. E. 399, it is held that a street railroad operating its lines in a city under a contract to issue transfer tickets free of charge to all passengers requesting the same, who might board its cars at any point on any of its lines in the city, and whose destination might be to any other point on any other line of the company's road in the limits of the city, is bound to transport a passenger tendering such transfer to his destination on the company's line, though that be in territory annexed to the city after the contract was made and on its interurban line on which it had a franchise entitling it to charge an additional fare outside the city as its limits were before such annexation of territory.

e. DUTY OF ASSIGNEE OF FRANCHISE TO INTERCHANGE TRANSFERS WITH ITS ASSIGNEE FROM AND TO ITS REMAINING LINES.

In *Reynolds v. Pacific Elec. Co.* (Cal.), 17 R. R. R. 658, 40 Am. & Eng. R. Cas., N. S., 658, 86 Pac. 77, it is held that an assignee of a

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street railway franchise, a condition of which required its holder to issue transfers to other lines in the city operated by it or its assignees, which assigned its right to another, and ceased operating cars under the franchise, could not be compelled to interchange transfers with its assignee from and to its remaining lines operating under other franchises.

f. APPLICATION OF STATUTE—BENEFICIAL OWNER OF RAILWAY LINES.

In *Chicago Union Traction Co. v. Chicago*, 199 Ill. 484, 65 N. E. 470, 579, it is held that the duty to give transfer tickets, imposed by section 1723 of the Rev. Code of Chicago, is one which arises out of the public nature of the business of street railway companies; and that this duty rests not merely upon the technical owner, but upon the real or beneficial owner, of the lines of street railways.

g. APPLICATION OF ORDINANCE—INTERSECTING LINES—PORTIONS OF LINE OWNED BY DIFFERENT COMPANIES.

The ordinance granting a franchise to a street railway company provided that it should sell half-fare tickets between certain hours, and give transfers at points where one line intersected with another. The company owned a line which extended from its point of intersection with another line to the city limits, beyond which it was owned by a different corporation but which ran its cars with the same operatives into the city and to the point of intersection. It was held that this line was an intersecting line, to which the provisions as to half-fare tickets and transfers applied. *Virginia Passenger & Power Co. v. Commonwealth (Va.)*, 18 R. R. R. 135, 41 Am. & Eng. R. Cas., N. S., 135, 49 S. E. 995.

h. ORDINANCE—CONTRACTUAL OBLIGATIONS.

In *Virginia Passenger & Power Co. v. Commonwealth (Va.)*, 18 R. R. R. 135, 41 Am. & Eng. R. Cas., N. S., 135, 49 S. E. 995, it is held that where the ordinance granting a franchise to a street railroad company imposed certain conditions as to rates of fare and giving of transfers, and the company operated its lines in accordance with the regulations, it thereby assumed contractual obligations with respect to such regulations.

i. CONTRACT WITH CITY—VIOLATION—TRANSFERS ISSUED ONLY TO PAYERS OF CASH FARES.

In *City of Philadelphia v. Philadelphia Rapid Transit Co. (Pa.)*, 34 R. R. R. 590, 57 Am. & Eng. R. Cas., N. S., 590, 73 Atl. 923, it appeared that a contract between a street railway company and a city provided that the "present rates of fare" may be changed from time to time with consent of both parties. The "present rates of fare" were five cents for a continuous ride, or a sale of tickets at the

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rate of six for five, and free transfers at certain places, both on the cash fares and the tickets. It was held that the contract was not violated by a rule of the company by which transfers were issued only to persons paying a cash fare, and not to those paying fare by tickets.

II. RIGHT OF PASSENGER TO DEMAND TRANSFER.**a. REFUSAL TO GIVE TRANSFER A REFUSAL TO CARRY.**

Where a person entered a street car to go to a designated place and paid the fare, and the company was obliged to carry her to the designated place and give her a transfer to enable her to do so, the refusal to give a transfer was a refusal to carry her to her destination. *South Covington, etc., R. Co. v. Quinn* (Ky.), 30 R. R. R. 508, 53 Am. & Eng. R. Cas., N. S., 508, 110 S. W. 404.

b. ORDINANCE—RIGHT TO RIDE TO END OF LINE—COMPLETION OF CONTRACT.

A passenger on a street car, who has paid his fare, is by virtue of that fact entitled to ride to the end of the line to which, under the city ordinances, he is entitled to be transferred, and the contract of carriage is completed when the fare is paid. *Morrill v. Minneapolis St. R. Co.* (Minn.), 28 R. R. R. 629, 51 Am. & Eng. R. Cas., N. S., 629, 115 N. W. 395.

c. CUSTOM TO ISSUE TRANSFERS NOT REQUIRED BY STATUTES.

In *Arnold v. Rhode Island Co.* (R. I.), 23 R. R. R. 414, 46 Am. & Eng. R. Cas., N. S., 414, 66 Atl. 60, it is held that if a street car company, according to its rules, issues transfers from and to certain lines, and the passenger presents a proper transfer which is not honored by the conductor, and the passenger is ejected, it is no defense to an action for the ejection that the statute does not require the issuance of a transfer between the particular lines in question.

d. CUSTOM TO GIVE TRANSFERS AT NEW INTERSECTION—APPLICATION OF CARRIER'S RULE.

In *Arnold v. Rhode Island Co.* (R. I.), 23 R. R. R. 414, 46 Am. & Eng. R. Cas., N. S., 414, 66 Atl. 60, an action against a street car company for the ejection of a passenger from a car after his presentation of a proper transfer, it appeared that a rule of the company required the giving of transfers between the two lines in question, but that when the rule was made the cars on the two lines ran in such directions that the point of intersection was other than the intersecting point at the time of the ejection; but it appeared that transfers had been habitually given at the new intersection. It was held that a contention that, under the circumstances, the rule was not applicable, and no transfer required, was without merit.

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e. IMPLIED OFFER TO ISSUE TRANSFERS NOT REQUIRED BY LAW—ACCEPTANCE.

Although a street railway company may not be required by law to carry a passenger on any other lines than the one over which the car originally boarded runs, still, if such company holds out to the public that it will, when fare is paid on the first car, issue a transfer giving the right to ride on other cars of its lines, a request for a transfer is an acceptance of this offer, and the delivery of the transfer completes a contract under which the passenger is entitled to demand the right to ride on both the original car and the transfer car; and the amount paid to the conductor of the first car is the consideration for the right to ride on each car, and the right to ride on the car to which the passenger is transferred is in no sense a gratuity. So held in *Georgia R., etc., Co. v. Baker* (Ga.), 20 R. R. R. 789, 43 Am. & Eng. R. Cas., N. S., 789, 54 S. E. 639.

f. ABSENCE OF EVIDENCE OF NOTICE TO PASSENGER OF DISCONTINUANCE OF CUSTOM TO GIVE TRANSFERS.

In *Freeman v. New City R. Co.* (N. Y. Sup. Ct.), 92 N. Y. Supp. 48, it is held that where a passenger, though he knew he could have traveled to his destination by pursuing a route over which defendant street railway issued transfers, had frequently traveled over the route selected, and had always been given a transfer, and there was no evidence of any notice of the discontinuance of transfers being given to him when he boarded the car, or until after no alternative continuous route was available, defendant was liable for refusal to issue a transfer to him on the occasion in question.

g. MANDAMUS.

A passenger entitled to a street car transfer can have the street railway company compelled by mandamus to give him one. *Richmond R., etc., Co. v. Brown*, 97 Va. 26, 32 S. E. 775.

h. "AGGRIEVED PARTY"—APPLICATION OF STATUTE—PERSON ON CAR MERELY TO SEEK INFORMATION.

And a person who boarded car merely to seek information as to the custom of the street railway company to issue or not to issue transfers at a certain point was not "an aggrieved party," under a statute of New York requiring street railways to give transfers under certain circumstances. *Bull v. New York City R. Co.* (N. Y.), 30 R. R. R. 154, 53 Am. & Eng. R. Cas., N. S., 154, 85 N. E. 385.

III. RIGHT TO USE TRANSFERS.

a. TRANSFER TORN IN TWO—CUSTOM—EVIDENCE.

In *Woods v. Metropolitan St. R. Co.*, 48 Mo. App. 125, the defense for ejecting a passenger was that he presented to the conductor a

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transfer check which was insufficient, since it was torn in two; and there was an offer to prove a rule of the company requiring the conductor to collect fares in money or by proper ticket or transfer check, and also to prove the custom of passengers, on receiving their checks at the place of transfer and finding that they did not want them, to tear them in two and throw them down. It was held that this was competent evidence.

b. ORDINANCE FORBIDDING UNAUTHORIZED PERSONS TO GIVE, SELL OR ISSUE TRANSFERS—VALIDITY.

In *Ex Parte Lorenzen*, 128 Cal. 431, 61 Pac. 68, it is held that an ordinance requiring street car transfers to be issued and delivered within the car from which the transfer is made, and received only within the car to which it is made, and forbidding any person, except the conductor or agent of the street car line, to give, sell or issue any transfer check or ticket issued for passage on any street car line, does not violate any constitutional provision, and is a valid exercise of powers expressly granted to municipal authorities.

c. SAME—APPLICATION—DELIVERY OF SEVERAL TRANSFERS TO PERSON PAYING FARES FOR PARTY.

But the general terms of the ordinance in question forbidding the giving away of an issued street railway transfer to any other person is not intended to forbid the delivery to several persons of transfers issued expressly for them by the conductor to the one paying the fare for them, or the passing up of a transfer to a conductor by the agency of another passenger on the car, or any other innocent or lawful use of the transfer. So held in *Ex parte Lorenzen*, 128 Cal. 431, 61 Pac. 68.

IV. RIGHT OF CARRIER TO REQUIRE TRANSFER CHECKS.

A street railway has a right to require passengers to procure transfer checks and tender them to the conductors of transfer cars, and for failure to comply with such requirement may eject a passenger failing or refusing to pay a cash fare. *Percy v. Metropolitan St. R. Co.*, 58 Mo. App. 75; *De Lucas v. New Orleans, etc., R. Co.*, 38 La. Ann. 930; *Crowley v. Fitchburg, etc., R. Co.*, 185 Mass. 279, 10 R. R. 584, 33 Am. & Eng. R. Cas., N. S., 584, 74 N. E. 56.

a. WHERE CHARTER PROVIDES FOR PASSAGE OVER TWO LINES FOR ONE FARE.

In *Percy v. Metropolitan St. R. Co.*, 58 Mo. App. 75, it is held that a regulation of a street railway company requiring a passenger to have and present a transfer check is reasonable and must be complied with in order to entitle the passenger to transportation, and this is not affected by the fact that the charter of the carrier provides for passage over two lines for one fare.

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b. RULE REQUIRING PRODUCTION OF UNDETACHED COUPON TICKET AT CERTAIN POINT.

In *De Lucas v. New Orleans, etc., R. Co.*, 38 La. Ann. 930, it is held that a rule of a street railway company, under a contract with a city requiring it to carry passengers over two sections of its line for one fare, requiring the passenger to show an undetached coupon ticket as a voucher of his right to continue beyond a given point, is reasonable in law, and the company is entitled to eject one refusing to comply with the requirement.

c. FAILURE TO GIVE TRANSFER — EXPLANATION SHOUTED BY ONE CONDUCTOR TO OTHER.

In *Crowley v. Fitchburg, etc., R. Co.*, 185 Mass. 279, 10 R. R. R. 584, 33 Am. & Eng. R. Cas., N. S., 584, 74 N. E. 56, it appeared that the rules of defendant street railway required that a passenger, on transferring from one line to another, should produce a transfer or pay his fare on the second line. Plaintiff, on leaving a car in order to transfer to another line, was not given a transfer by the conductor of the car he was leaving but such conductor shouted to the other conductor that plaintiff had paid his fare, and that he should be passed, but upon plaintiff's refusal to pay a fare on the car to which he transferred, he was ejected by its conductor. It was held the conductor had no right to disregard such rule, and had a right to eject plaintiff.

d. CUSTOM TO CHANGE WITHOUT TRANSFER—DISCONTINUANCE—NOTICE.

But if a street railway company has established a custom under which passengers may change without a transfer, from one car into another in the completion of their journey, it cannot change such practice without due notice. So held in *Consolidated Traction Co. v. Taborn*, 58 N. J. L. 1, 2 Am. & Eng. R. Cas., N. S., 124.

V. TIME FOR USE OF TRANSFER CHECK LIMITED.**a. REASONABLENESS OF REQUIREMENT.**

Where a street railroad company voluntarily permits passengers to transfer from one of its cars to another and continue their journey without the payment of additional fare, it is reasonable to require, as a condition precedent to the exercise of this right, that the passenger shall tender to the conductor of the second car a printed transfer check, which must be used within a time indicated by punch marks on the check, provided a car upon which the passenger can be conveniently and comfortably transported passes the transfer point within the time limited. *Hornesby v. Georgia R., etc., Co.*, 120 Ga. 913, 12 R. R. R. 421, 35 Am. & Eng. R. Cas., N. S., 421, 48 S. E. 339; *Garrison v. United Rys., etc., Co. (Md.)*, 8 R. R. R. 301, 31 Am. & Eng. R. Cas., N. S., 301, 55 Atl. 371; *Crowley v. Fitchburg, etc.,*

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R. Co., 185 Mass. 279, 10 R. R. R. 584, 33 Am. & Eng. R. Cas., N. S., 584, 74 N. E. 56; *Heffron v. Detroit City Railroad*, 92 Mich. 406, 52 N. W. 802.

b. EXPIRATION OF TIME LIMIT—VOID ON FACE.

When the time limit of a street car transfer has expired it is void on its face, and a conductor is justified in refusing to honor it and demanding a cash fare. *Garrison v. United Rys., etc., Co. (Md.)*, 8 R. R. R. 301, 31 Am. & Eng. R. Cas., N. S., 301, 55 Atl. 371.

c. FIFTEEN MINUTES—TRANSFERS NOT REQUIRED BY LAW.

In *Heffron v. Detroit City Railroad*, 92 Mich. 406, 52 N. W. 802, it is held that there is nothing unreasonable in a requirement that a street railway transfer from one route to another shall not be honored unless used within fifteen minutes after its delivery to the passenger, in the absence of any obligation on the part of the carrier by charter, ordinance, or contract to make such transfer, and carry the passenger over both routes for one fare.

d. TEN MINUTES—VALIDITY OF RULE.

But a rule of a street railway that the transfer check given to a passenger on alighting from the car on which he began his journey for the purpose of enabling him to continue it on another car shall be void if not used within ten minutes, regardless of whether the condition of the cars which the carrier supplies during that period is such as to afford him suitable accommodations, is arbitrary and illegal, and the acceptance of such a transfer ticket does not modify the original contract of carriage or waive any right acquired under it by the passenger. So held in *Jenkins v. Brooklyn Heights R. Co.*, 30 N. Y. App. Div. 622, 51 N. Y. Supp. 868.

VI. EXPIRATION OF TIME LIMIT WITHOUT PASSENGER'S FAULT.

But where a street car transfer expires before the passenger, who is without fault in the premises, has an opportunity to use it, he is entitled to ride on the first car of the transfer line passing the transfer point, and may recover against the carrier if his transfer is dishonored because not used within its time limit, and he is ejected for refusal to pay another fare. *Hornesby v. Georgia R., etc., Co.*, 120 Ga. 913, 12 R. R. R. 421, 35 Am. & Eng. R. Cas., N. S., 421, 48 S. E. 339; *Heffron v. Detroit City Railroad*, 92 Mich. 406, 52 N. W. 802; *Appleby v. St. Paul City R. Co.*, 54 Minn. 169, 55 N. W. 1117; *Golden v. Pittsburg R. Co.*, 28 Pa. Supr. Ct. Rep. 313; *Taylor v. Nassau Elec. R. Co.*, 32 N. Y. App. Div. 486, 53 N. Y. Supp. 5.

a. FIRST CAR PASSING TRANSFER POINT.

If a street car passenger takes the first car which passes the point of transfer after he alights from the one on which he originally took

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passage, even though the time within which his transfer is receivable by the conductor by the provision on its face has expired, the passenger may have an action against the carrier for being ejected from the latter car by the conductor for refusal to pay a second fare. So held in *Heffron v. Detroit City Railroad*, 92 Mich. 406, 52 N. W. 802.

b. "NEXT" CONNECTING CAR ON ANOTHER LINE—CAR TAKEN OFF—NEXT PASSING CAR TAKEN.

In *Appleby v. St. Paul City R. Co.*, 54 Minn. 169, 55 N. W. 1117, it appeared that plaintiff paid his fare, and received a transfer check which entitled him to continue his journey by the "next" connecting car on another line of the same company; that he took the next car on the connecting line; and the conductor took up his transfer check; that, without notice to plaintiff, this car was taken off after going a short distance; that (the conductor having disappeared) plaintiff was informed by the driver of such car that he should take the next passing car; and that he did so, but was put off by its conductor because he had no transfer check and refused to pay another fare. It was held that he showed, *prima facie*, a right to recover for the conduct of the carrier's agents, leading to and including the expulsion.

c. NOT GOOD ON NIGHT CARS—ONLY NIGHT CAR AVAILABLE.

In *Golden v. Pittsburg R. Co.*, 28 Pa. Supr. Ct. Rep. 313, it is held that where a passenger receives a transfer ticket which is marked not good on night cars, and at the transfer point attempts to board four cars in succession, but is prevented by the conductors on the ground that the cars were only going to the barn, and subsequently gets on the fifth car, which proves to be a night car, and is excluded therefrom when he presents his ticket and refuses to pay an additional fare, the company will be liable as for a wrongful ejection.

d. CAR DELAYED—RIGHT TO TRANSFER TO ANOTHER CAR.

But in *Taylor v. Nassau Elec. R. Co.*, 32 N. Y. App. Div. 486, 53 N. Y. Supp. 5, it is held that a passenger upon an electric car which is unreasonably delayed, has no right to insist upon riding, without the payment of another fare, upon another car of the same road in order to sooner reach his destination, and if the carrier refuses to make the desired transfer, his remedy is an action for damages for breach of the railway's contract with him.

VII. USE OF TRANSFER IN SAME DIRECTION ONLY.

A street railway company, for the protection of its pecuniary interests, has the right to make and enforce a rule limiting the use of a transfer check to the same general direction of the passenger's initial trip, in order to prevent its use for the whole or a portion of the return trip. *Kelley v. New York City R. Co.* (N. Y.), 30 R. R. R. 368, 53 Am. & Eng. R. Cas., N. S., 368, 74 N. E. 569.

Note**a. TIME AND MANNER OF TRANSPORTATION—POWER OF CARRIER TO REGULATE.**

In *Kelley v. New York City R. Co.* (N. Y.), 30 R. R. R. 368, 53 Am. & Eng. R. Cas., N. S., 368, 74 N. E. 569, it is held that N. Y. Laws 1890, p. 1127, c. 565, § 104, as amended by Laws 1892, p. 1406, c. 673, requiring every street railway company to carry between any two points on the road over which it has the right to run cars any passenger desiring to make "one continuous trip" between such points for a single fare, and to give the passenger a transfer entitling him to a "continuous trip" to any point on the road, for the promotion of public convenience by the operation of railroads "as a single railroad with a single rate of fare," does not prevent a street railway company authorized by section 4, subd. 8, to regulate the time and manner in which passengers shall be transported, and the compensation to be paid, from adopting regulations requiring passengers making use of transfers to use the same only in the same general direction of their initial trip.

b. GOOD "FOR A CONTINUOUS RIDE"—BOARDING ANOTHER CAR BELOW ISSUE POINT OF TRANSFER—PAYMENT OF FARE TO ISSUE POINT.

But in *McMahon v. Third Ave. R. Co.*, 15 J. & S. (N. Y.), 282, it appeared that on leaving a car plaintiff received a transfer check which stated that it was good "for a continuous ride" from the street where it was issued to the end of the company's line. Plaintiff did not take another car at that place, but during the afternoon of the same day got on a car below where the check had been issued, paid his fare, and after passing the place where the check had been issued tendered it for further fare, but it was rejected. It was held that the carrier was liable as plaintiff had the right to ride on any car; and that the word "continuous" did not apply to the portion of the route traveled before the check was issued.

c. TRANSFER COMPLETE EVIDENCE OF CONTRACT—EFFECT OF RULE AS TO PLACE OF USE—NOTICE.

And in *De Board v. Camden Interstate R. Co.* (W. Va.), 25 R. R. R. 84, 48 Am. & Eng. R. Cas., N. S., 84, 57 S. E. 279, it is held that a street railway ticket or transfer check, in the hands of the purchaser thereof for use on the car lines of the company issuing it, constitutes the complete evidence of the contract between the purchaser and the carrier, and the privileges evidenced by its terms are not subject to limitation by a mere rule of the company as to place where it must be used, knowledge of which the purchaser did not have, and could not conveniently have ascertained.

VIII. WRONG OR DEFECTIVE TRANSFER CHECK.**a. EXAMINATION OF CHECK BY PASSENGER.**

On the question whether a passenger must, at his peril, read and examine a transfer check tendered him by a conductor, the author-

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ities do not seem to agree. In the following cases it is held that the passenger's failure to examine his transfer would not prevent him from recovering for his ejection from the transfer car, resulting from the act of the conductor of the initial car in giving him a wrong or defective transfer check. *Hornesby v. Georgia R., etc., Co.*, 120 Ga. 913, 12 R. R. R. 421, 35 Am. & Eng. R. Cas., N. S., 421, 48 S. E. 339; *Morrill v. Minneapolis St. R. Co. (Minn.)*, 28 R. R. R. 629, 51 Am. & Eng. R. Cas., N. S., 629, 115 N. W. 395; *Memphis St. R. Co. v. Graves (Tenn.)*, 8 R. R. R. 505, 31 Am. & Eng. R. Cas., N. S., 505, 75 S. W. 729; *Moon v. Interurban St. R. Co. (N. Y. Supp. Ct.)*, 85 N. Y. Supp. 363; *Lawshe v. Tacoma R., etc., Co. (Wash.)*, 6 R. R. R. 38, 29 Am. & Eng. R. Cas., N. S., 38, 70 Pac. 118; *Golden v. Pittsburg R. Co.*, 28 Pa. Supr. Ct. Rep. 313; *O'Rourke v. Citizens' St. R. Co.*, 103 Tenn. 124, 52 S. W. 872.

(1) Duty Rests upon Conductor.

The duty to see that a proper transfer slip is given rests upon the conductor, and not upon the passenger. So held in *Morrill v. Minneapolis St. R. Co. (Minn.)*, 28 R. R. R. 629, 51 Am. & Eng. R. Cas., N. S., 629, 115 N. W. 395.

(2) Defective Transfer—Negligence of Carrier.

In *Memphis St. R. Co. v. Graves (Tenn.)*, 8 R. R. R. 505, 31 Am. & Eng. R. Cas., N. S., 505, 75 S. W. 729, it is held that where the conductor of a street car gave plaintiff a transfer which was refused by the conductor of the car to which plaintiff properly changed, on the ground that it was defective, and plaintiff, being without money, was forcibly expelled from the car, he could recover therefor against the railroad; negligence in the issuing of the transfer being that of the company, and plaintiff not having been bound to examine it.

(3) May Rely upon Conductor.

In *Morrill v. Minneapolis St. R. Co. (Minn.)*, 28 R. R. R. 629, 51 Am. & Eng. R. Cas., N. S., 629, 115 N. W. 395, it is held that no absolute duty rests upon a street car passenger to examine the transfer slip when it is delivered to him and see that it is for the proper car and is properly punched, and he may rely upon the inference that the conductor has properly done his work and performed the duty imposed upon him.

(4) Right to Assume That Transfer Is Correct.

In *Moon v. Interurban St. R. Co. (N. Y. Sup. Ct.)*, 85 N. Y. Supp. 363, it is held that where it was a street car conductor's duty, under a certain statute, to have given a certain transfer, the passenger had the right to assume, without examination of the check, that he had given the proper transfer.

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(5) Transfer to Wrong Line—Not Required to Make Technical Examination.

In *Lawshe v. Tacoma R., etc., Co.* (Wash.), 6 R. R. R. 38, 29 Am. & Eng. R. Cas., N. S., 38, 70 Pac. 118, it appeared that a passenger on a street car line on which the company issued transfers to its various connecting lines received from the conductor a transfer to a line other than the one to which he had requested one. Not noticing the mistake, he presented it to the conductor on the line to which he had requested a transfer, who refused to accept it. The passenger refused to pay further fare, and was ejected. It was held that since the passenger was under no obligation to make a technical examination of the transfer slip, and since the company was responsible for the mistake of its agent, it was liable in substantial damages for the breach of contract occasioned thereby, though the conductor called upon to correct the mistake was not the one who had made it.

(6) Transfer Given When Leaving Car.

Where a passenger on a street car makes a timely request for a transfer check and it is not given to him until he is just in the act of leaving the car, he is not bound by conditions printed on its back, and with which he has had no reasonable opportunity to acquaint himself. So held in *Dennis v. Pittsburg, etc., R. Co.*, 165 Pa. 624, 31 Atl. 52.

Same.—In *Laird v. Pittsburg Traction Co.*, 166 Pa. 4, 31 Atl. 51, it appeared that a street car passenger received a transfer check, on which both the 9 o'clock A. M. hour and the 7:30 o'clock A. M. hour were punched. On the back of the check was this condition: "It is the duty of the person receiving it, and one of the conditions upon which this check is accepted, that the passenger examine date and time and see that same are correct." Plaintiff made a timely request for the transfer check, but it was not given him until he was in the act of leaving the car. The conductor of the transfer car refused to take the ticket alleging that it was "two hours old." The passenger assured him that he received the check at 9 o'clock A. M., immediately before entering the second car, but was ejected upon refusing to pay a second fare. It was held that he was entitled to recover for his ejection against the carrier.

(7) Effect of Condition on Check.

In *O'Rourke v. Citizens' St. R. Co.*, 103 Tenn. 124, 52 S. W. 872, it is held that a condition endorsed upon a street railway transfer is void which requires a passenger to examine "the date, time and direction" indicated by the conductor's punch, and to see that they are correct, the passenger having the right to assume that his transfer is properly punched.

(8) Time Limit—No Rights Acquired by Passenger through Failure to Read Check.

But in *Heffron v. Detroit City Railroad*, 92 Mich. 406, 52 N. W.

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802, it is held that it is the duty of a passenger receiving a transfer ticket from one route of a street railway to another to read it, and his failure to do so cannot give him any right against the company which he would not have had had he read it, and thereby been notified that it provided that it would not be honored unless used within fifteen minutes after its delivery to the passenger.

(9) Mistake of Conductor—Colored Check Good on Only One Line.

And in *Bradshaw v. South Boston R. Co.*, 135 Mass. 407, 46 Am. Rep. 481, 16 Am. & Eng. R. Cas. 386, it appeared that a company operating several street railway lines was in the habit of transferring passengers from one to the other, giving colored checks for the purpose, each designating the line on which it was to be used, and not good on any other line. Plaintiff, who was not familiar with this practice, by a mistake received a wrong check from a conductor without reading it. It was held that he was required to pay his fare on the second line or be expelled.

(10) Entitled to Transfer over Any One of Connecting or Crossing Lines—Limited to Line Plainly Designated on Transfer.

So in *Pine v. St. Paul City R. Co.*, 50 Minn. 144, 52 N. W. 392, it appeared that, by a city ordinance granting certain franchises to defendant street railway, a passenger who had paid one fare on any line operated by the company was entitled to a transfer check entitling him to a continuous passage over any connecting or crossing line. It was held that where such a passenger accepted a transfer for one of several or continuous or crossing lines, plainly marked or designated, he would be limited to the line so selected, but where the route designated was not so limited, but was equally applicable to several lines, he would be entitled to be transported by either.

(11) Care Required in Asking for and Using Transfer.

And a passenger must, at his peril, exercise ordinary care to ask for the proper transfer and board the right car. *Eddy v. Syracuse Rapid-Transit R. Co.*, 50 N. Y. App. Div. 109, 63 N. Y. Supp. 645; *Cleveland City R. Co. v. Conner*, 74 Ohio St. 225, 78 N. E. 376.

b. CONDUCTOR'S DUTY WITH RESPECT TO EXPLANATIONS OF PASSENGER.

As a general rule, the conductor of the second car is under no obligation to accept the explanations of a passenger presenting a wrong or defective transfer, or unable to produce one. *Norton v. Consolidated R. Co. (Conn.)*, 24 R. R. R. 437, 47 Am. & Eng. R. Cas., N. S., 437, 63 Atl. 1087; *People v. Detroit United R. Co. (Mich.)*, 32 R. R. R. 158, 55 Am. & Eng. R. Cas., N. S., 158, 118 N. W. 9; *Mahoney v. Detroit St. R. Co.*, 93 Mich. 612, 53 N. W. 793; *Woods v. Metropolitan St. R. Co.*, 48 Mo. 125.

Note

(1) Assertion of Payment of Fare.

It is the duty of a street car passenger to secure a transfer as evidence of the payment of fare on the initial car, and the conductor of the transfer car is under no legal obligation to accept the passenger's statement as to such payment. So held in *Mahoney v. Detroit St. R. Co.*, 93 Mich. 612, 53 N. W. 793; *People v. Detroit United R. Co.* (Mich.), 32 R. R. R. 158, 55 Am. & Eng. R. Cas., N. S., 158, 118 N. W. 9.

(2) Improper Transfer.

The conductor in charge of a street car may properly refuse to accept a passenger's explanation of the mistake of a conductor of the other car in giving him an erroneous transfer, and require him to pay his fare or leave the car. So held in *Norton v. Consolidated R. Co.* (Conn.), 24 R. R. R. 437, 47 Am. & Eng. R. Cas., N. S., 437, 63 Atl. 1087.

(3) Investigation—Duty of Conductor.

A street car conductor cannot stop to investigate the right which a passenger may have aside from the evidence of such right presented to him. So held in *Woods v. Metropolitan St. R. Co.*, 48 Mo. 125.

(4) Mistake in Issuing Check.

But in *Georgia R., etc., Co. v. Baker* (Ga.), 20 R. R. R. 789, 43 Am. & Eng. R. Cas., N. S., 789, 54 S. E. 639, it is held that if a mistake is made by the conductor of the first street car in issuing a transfer, and the passenger presents the transfer to the conductor of the second car and gives a reasonable explanation of the mistake of the conductor of the first car, the conductor of the second car must at his peril determine whether the passenger is entitled to ride upon the transfer, although it does not show such right upon its face.

(5) Improper Transfer—Reasonable Explanations.

So where a passenger is aboard a street car without the proper transfer check, which is due to the mistake or fault of the conductor of the car from which he was transferred, and not to the fault of the passenger, the conductor of the transfer car must accept the reasonable explanation of the passenger in regard to the transfer in dispute. *Indianapolis St. R. Co. v. Wilson* (Ind.), 7 R. R. R. 841, 30 Am. & Eng. R. Cas., N. S., 841, 66 N. E. 950.

(6) Not Exclusive Evidence.

And the transfer slip is not the sole and exclusive evidence of the passenger's right to ride. *Morrill v. Minneapolis St. R. Co.* (Minn.), 28 R. R. R. 629, 51 Am. & Eng. R. Cas., N. S., 629, 115 N. W. 395.

Note

c. EJECTED BY CONDUCTOR OF TRANSFER CAR THROUGH FAULT OF FIRST CONDUCTOR—LIABILITY.

Where a passenger's ejection from the transfer car is the result of the fault of the conductor of the initial car in giving him a wrong or defective transfer check, or in failing to give him one, he may recover against the carrier the damages resulting from his ejection, although the conductor of the transfer car did no more than his duty in ejecting him. *Norton v. Consolidated R. Co. (Conn.)*, 24 R. R. 437, 47 Am. & Eng. R. Cas., N. S., 437, 63 Atl. 1087; *Eddy v. Syracuse Rapid-Transit R. Co.*, 50 N. Y. App. Div. 109, 63 N. Y. Supp. 645; *Mucke v. Rochester R. Co.*, 86 N. Y. Supp. Ct. Rep. 32; *Cleveland City R. Co. v. Conner*, 74 Ohio St. 225, 78 N. E. 376; *Laird v. Pittsburg Traction Co.*, 166 Pa. 4, 31 Atl. 51; *Golden v. Pittsburg R. Co.*, 28 Pa. Supr. Ct. Rep. 313.

(1) Carrier Responsible for Defects in Transfers—Several Conductors—Continuous Act.

In *Golden v. Pittsburg R. Co.*, 28 Pa. Supr. Ct. Rep. 313, it is held that a street railway transfer ticket is evidence of the contract as made out and punched by the carrier; and if it fails to disclose the true contract, the carrier is responsible for the natural consequences of variances; and it is immaterial in this connection that the transaction for the carriage of the passenger was conducted through several conductors instead of one; their combined acts constituting but one continuous act of the carrier.

(2) Transportation over Two Street Railways—Portion of Upper Part of Ticket Left upon Lower.

In *Rouser v. North Park St. R. Co.*, 97 Mich. 565, 56 N. W. 937, it appeared that a passenger, on paying the fare, was entitled to transportation over the lines of two street railways, for which a ticket of peculiar color and print was used, consisting of two parts separated by a perforated line, the lower part containing the evidence of the passenger's right to ride over the road of the company to which the fare was paid; and it was the duty of the conductor to deliver to him the upper part, which contained the evidence of his right to ride over the other road. By mistake, the conductor so separated the parts as to leave a portion of the upper part upon the lower part of the ticket, and delivered the remainder of the upper part to the passenger. The conductor of the other road refused to accept this fragment, and, on the refusal of the passenger to pay fare, ejected him. It was held, as a matter of law, that the last conductor was bound to know that the fragment was a portion of a genuine ticket used upon his line, which, if whole, would have entitled the passenger to a ride over the line; and that plaintiff was, therefore, entitled to recover for his ejection.

Note

(3) Threat to Eject—Legal Wrong.

A threat by the conductor of the second car to expel a passenger on account of a mistake in his transfer check is a legal wrong, giving the passenger a right of action against the company, although there is nothing insulting in the words or the manner of the conductor, further than a mere threat to expel might be deemed an insult. So held in *Georgia R., etc., Co. v. Baker* (Ga.), 20 R. R. R. 789, 43 Am. & Eng. R. Cas., N. S., 789, 54 S. E. 639.

(4) Improper Transfer—Right to Resist Ejection.

In *Norton v. Consolidated R. Co.* (Conn.), 24 R. R. R. 437, 47 Am. & Eng. R. Cas., N. S., 437, 63 Atl. 1087, it is held that a passenger who is on a street car without a proper transfer, due to the negligence of the conductor of the other car, may sue for breach of contract for failure to furnish a proper ticket and recover the loss necessarily resulting therefrom, but cannot refuse to pay his fare, and forcibly resist being expelled from the car, and where he does so, and no more force is used than is necessary to remove him from the car, he can recover only nominal damages.

(5) Expiration Shown on Face of Check—Assured by Conductor—Ejection—Contributory Negligence.

But in *Nicholson v. Brooklyn Heights R. Co.* (N. Y. App. Div.), 103 N. Y. Supp. 310, it is held that where a passenger received a street railway transfer that showed on its face that it was then expired, but was assured by the conductor that such fact would not prevent it from being honored, but the conductor of the transfer car refused to take it, and ejected the passenger for refusing to pay a second fare, the latter was not entitled to recover against the carrier, although there was a statutory penalty for failure to give a passenger the transfer he was entitled to; the statute not contemplating that, in addition to the penalty, the passenger might recover for indignities to which he voluntarily subjected himself.

(6) Wrong Transfer—Passenger's Misrepresentations as to Initial Line.

And in *Carpenter v. Washington, etc., R. Co.*, 121 U. S. 474, 30 L. Ed. 1015, 7 Sup. Ct. Rep. 1002, it appeared that a passenger was given a street car transfer, but was told on the second line that it was intended for a different line, and he was ejected. There was evidence that plaintiff was well acquainted with the different lines, and evidence tending to show he did not get off the car he said he did, which was calculated to mislead the agent giving him the ticket. It was held that an instruction that if the jury believed plaintiff did not get off of the line of cars as related by him, but came from another line, and received the transfer without objection, and undertook to ride on a line that it did not call for, he could not recover, was not erroneous.

Note**(7) Expiration of Transfer Check before Transfer Point Is Reached
—Voluntary Attempt to Walk to Transfer Point in Time.**

No recovery can be had where the initial car does not reach the transfer point until after the time indicated by the punch marks on the passenger's transfer check, and the passenger voluntarily leaves such car before it reaches such point, and makes an unsuccessful attempt to walk to the transfer point before the time limit expires. In such a case it is the duty of the passenger to remain on the car, and give its conductor an opportunity to make arrangements for his transportation on the transfer car, and this is true though it is the custom of the company not to issue new transfer checks where the initial car is delayed. So held in *Hornesby v. Georgia R., etc., Co.*, 120 Ga. 913, 12 R. R. R. 421, 35 Am. & Eng. R. Cas., N. S., 421, 48 S. E. 339.

(8) Failure to Make Explanation—Ejection.

The failure by a person to make a statement or explanation, before he was put off a street car, for having a wrong transfer, through the mistake of the conductor of the initial car, would not of itself defeat his right to recover, but such fact is admissible in evidence as part of the *res gestæ*, as bearing upon the question of his good faith in accepting and using the improper transfer and as affecting the amount of damages. So held in *Cleveland City R. Co. v. Conner*, 74 Ohio St. 225, 78 N. E. 376.

d. MAY REFUSE TO PAY SECOND FARE, AND RECOVER FOR EJECTION.

If a street car passenger is expelled by the conductor on account of a defect in his transfer check, imputable solely to the fault or negligence of the conductor of the initial car, he can maintain an action for damages for the ejection, and cannot be required to pay a second fare and seek redress by action for breach of contract or for negligence of the conductor who issued the transfer. *O'Rourke v. Citizens' St. Ry. Co.*, 103 Tenn. 124, 52 S. W. 872.

(1) Valid Transfer.

Where a passenger on a street car presented a valid transfer, which the conductor refused to honor, and, as the passenger refused to pay fare, ejected him from the car, he was entitled to recover damages for the ejection, it not being necessary for him to pay his fare, and then resort to an action to recover it. So held in *Arnold v. Rhode Island Co. (R. I.)*, 23 R. R. R. 414, 46 Am. & Eng. R. Cas., N. S., 414, 66 Atl. 60.

(2) Right to Resist Ejection.

But in *Kiley v. Chicago City R. Co.*, 189 Ill. 384, 59 N. E. 794, it is held that it is the duty of a street car passenger, when the

Note

transfer tendered him is refused, to either pay his fare or leave the car at the request of the conductor, and if he refuses to leave, and sustains an injury while resisting ejection he cannot recover therefor, unless he can show that the conductor used more force than was necessary.

(3) Controversy as to Validity of Transfer—Condition Requiring Application at Carrier's Office.

A condition on a transfer issued by a street railway that "the holder, by accepting agrees that, should any controversy arise as to its validity, holder will pay fare and call at company's office for correction," is unreasonable and void. So held in *Georgia R., etc., Co. v. Baker* (Ga.), 20 R. R. R. 789, 43 Am. & Eng. R. Cas., N. S., 789, 54 S. E. 639; *O'Rourke v. Citizens' St. R. Co.*, 103 Tenn. 124, 52 S. W. 872.

c. DAMAGES.

(1) Given Wrong Check—Measure of Damages.

Where a street car passenger, as the result of the negligence or mistake of the conductor of the initial car in giving him a wrong transfer check, is compelled to pay a second fare, the measure of damages, in the absence of malice, insult, or other aggravating circumstances, is the fare overpaid. *Hoelljes v. Interurban St. R. Co.*, 43 N. Y. Misc. Rep. 350, 87 N. Y. Supp. 133; *Moon v. Interurban St. R. Co.* (N. Y. Supp. Ct.), 85 N. Y. Supp. 363; *Carr v. Toledo Traction Co.*, 19 Ohio Cir. Ct. Rep. 281.

(2) Presentation of Valid Transfer—Previous Trouble—Assured as to Rights by Carrier—Excessive Verdict.

Where, in an action for the ejection of a passenger from a street car after he had presented a valid transfer, it appeared that plaintiff had previously had trouble in regard to transfers at the point in question, and had been assured by the officers of the carrier that he was right in his demands, and that transfers should be honored, a verdict for \$175 was not excessive. *Arnold v. Rhode Island Co.* (R. I.), 23 R. R. R. 414, 46 Am. & Eng. R. Cas., N. S., 414, 66 Atl. 60.

(3) Refusal to Give Transfer—Girl of Eleven Ejected—Darkness—Fright—Excessive Verdict.

In *South Covington, etc., R. Co. v. Quinn* (Ky.), 30 R. R. R. 508, 53 Am. & Eng. R. Cas., N. S., 508, 110 S. W. 404, an action against a street railway company for failure to give a transfer to a passenger, it appeared that plaintiff, a girl of eleven years old, lived at L. and went to school at N.; that she took a car at N. for C., and paid the fare; that the conductor refused to give her a transfer entitling her to take a car at C. for L.; and that she was obliged to walk home from C. It was a dark evening, and she suffered from fright and from sickness caused by her running home. It was held that

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a verdict for \$425 was not excessive; a recovery for the freight and for the sickness being authorized.

(4) Failure to Give Transfers—Ejection of Husband and Wife—Mud—Exemplary Damages.

In *City & Sub. R. Co. v. Brauss*, 70 Ga. 368, 18 Am. & Eng. R. Cas. 324, it appeared plaintiff and his wife entered a street car, and presented to the conductor tickets entitling them to ride to their destination. They were transferred to another car by the conductor of the first car personally, but were given no transfer tickets, nor did plaintiff know that they were necessary. Subsequently the conductor of the transfer car called for a transfer ticket or another payment of fares, and in default thereof ejected plaintiff and his wife, requiring them to get off the car in the mud a short distance from a street crossing, and in the presence of a number of people. It was held that exemplary damages were recoverable.

A. R. Y.

SCHUYLER *et al.* v. SOUTHERN PAC. CO.

(Supreme Court of Utah, Aug. 28, 1909. On Rehearing, June 2, 1910.)

[109 Pac. Rep. 458.]

Appeal and Error—Time for Taking Appeal—Computation.—Though the verdict was rendered more than six months before the perfection of an appeal, the appeal will not be dismissed on the ground that it was not taken in time, where it sufficiently appears from the record that it was taken within the statutory period from the date of the order overruling a motion for a new trial.

Removal of Causes—Grounds for Removal—Cases Arising under Constitution and Law of United States—Allegations in Pleadings.—In an action against a carrier for the death of an assistant chief mail clerk, the complaint alleged that deceased, while not on duty, was riding on defendant's train, under an engagement between defendant and the United States government to transport the mail, together with the mail clerks and employees in the railway mail service, and that it was necessary for deceased in the discharge of his duties to ride in the mail cars, and that while he was "necessarily in a certain mail car" operated by defendant, and while he was being so transported by defendant "for a consideration" and under arrangements between defendant and the "government of the United States," the train was derailed, and deceased was killed. Held, that the complaint did not present a case of a civil nature at law, arising under the Constitution and laws of the United States within the meaning of the removal act, in that it involved the

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question as to whether under Const. U. S. art. 1, § 8, declaring that Congress shall have power to establish post offices and post roads. Act Cong. March 3, 1897, c. 385, 29 Stat. 644, pertaining to the messenger service in connection with railroads, Act Cong. Feb. 4, 1887, c. 104, 24 Stat. 379 (U. S. Comp. St. 1901, p. 3154), and acts amendatory thereof, including Act June 29, 1906, c. 3591, 34 Stat. 584 (U. S. Comp. St. Supp. 1909, p. 1149), Act Cong. June 13, 1898, c. 446, 30 Stat. 440, and Act Cong. June 9, 1896, c. 386, 29 Stat. 313 (U. S. Comp. St. 1901, p. 2724), and acts amendatory thereof and supplemental thereto, relating to the transportation of railway mail clerks, and the Hepburn act (Act June 29, 1906, c. 3591, § 1, par. 4, 34 Stat. 584 [U. S. Comp. St. Supp. 1909, p. 1151]), prohibiting common carriers engaged in interstate commerce from issuing or giving free interstate transportation for passengers, a mail clerk in the railway mail service of the United States when not engaged in the discharge of his duties as a mail clerk, and when traveling for his own convenience and purpose, can lawfully be given free interstate transportation, since the complaint did not show on its face that deceased's right to transportation was derived from the federal statutes, or that his cause of action was based on such statutes.

Removal of Causes—Grounds—Cases Arising under Constitution and Laws of the United States.—A case cannot be removed simply because in the progress of the litigation it may be necessary to give a construction to the Constitution or laws of the United States.

Infants—Actions by—Appointment of Guardian Ad Litem.—Comp. Laws 1907, §§ 2907, 2908, providing that, when an infant is a party, he must appear either by his general guardian or by a guardian ad litem appointed by the court in which the action is pending, and that a guardian ad litem may be appointed in any case when it is deemed by the court in which the action is prosecuted expedient to represent the infant, though he may have a general guardian and may have appeared by him, authorizes the appointment of a guardian ad litem for resident and nonresident minor plaintiffs as well as resident and nonresident minor defendants.

Trial—Instructions—Duty of Jury to Obey.—The jury is bound to follow the instructions of the court, whether such instructions are right or wrong.

Carriers—Who Are Passengers—Burden of Proof.—In an action for the death of a railway mail clerk, the burden of proving that deceased was in the discharge of his official duties at the time of the accident in which he was killed is on plaintiff.

Trial—Instructions—Weight of Evidence.—In an action against a carrier for the death of a railway mail clerk, an instruction that it is to be presumed that deceased was in the railway car lawfully and rightly in the discharge of his official duties as such mail clerk, and the burden is on defendant to overcome that presumption by affirmative proof and by a preponderance of evidence, but that presumption would be overcome if it was shown by affirmative proof and

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by a preponderance of the evidence that he was not in the discharge of his official duties, was erroneous, as invading the province of the jury on the weight to be given a mere inference of fact.

Evidence—Burden of Proof.—An evidentiary showing, however strong, made by a party having the affirmative of an issue, whether by direct evidence of the witnesses or indirect evidence of inferences and presumptions, does not cast the burden on the other party to prove the negative, but the burden of proof in either case remains throughout with him who has the affirmative.

On Rehearing.

Carriers—Who Are Passengers—Evidence.—In an action against a carrier to recover for the death of a railway mail clerk, evidence held insufficient to support a finding that at the time of the accident in which decedent was killed decedent was on defendant's train in the discharge of duties pertaining to the railway mail service.

Carriers—Injuries to Passenger—Pleading—Variance.—In an action against a carrier to recover for the death of one alleged to have been a passenger, there can be no recovery on the ground of ordinary negligence of defendant in injuring a person not a passenger.

Carriers—Injuries to Passenger—Pleading and Proof—"Material Variance."—Where a complaint alleged that plaintiff's decedent at the time of his negligent killing by defendant carrier was in the discharge of his duties as a railway mail clerk, a recovery may be had, though the evidence establishes that decedent at the time of the fatal accident was not in the discharge of his duties as a mail clerk, but was a gratuitous passenger, as a carrier owes the same degree of care in the transportation of a gratuitous passenger as in the case of a passenger for hire; and hence the variance was not material within the meaning of Comp. Laws 1907, §§ 3001-3003, providing that no variance between the allegations and the proof is to be deemed material unless it has actually misled the adverse party to his prejudice.

Carriers—Injuries to Passenger—Question for Jury.—In an action against a carrier to recover for the death of a railway mail clerk, evidence held to conclusively show that decedent at the time of his death was rightfully on defendant's train so as to warrant the direction of a verdict in favor of plaintiff on the issue as to whether or not he was a trespasser on the train.

Statutes—Construction—Executive Construction.—While the rulings of the Interstate Commerce Commission as to the construction to be given to federal statutes relating to interstate commerce will be given great weight by the courts in determining the meaning of such statutes, such weight is not to be accorded to such rulings, where they are given in a nonofficial character and in response to private inquiry.

Carriers — Regulation — Free Transportation.—Congress may in prohibiting interstate carriers from issuing free transportation ex-

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cept such persons from the operation of the general prohibition as it may see fit.

Statutes—Construction—Exceptions.—An exception of a particular thing from the operation of the general words of a statute tends to show that it was the opinion of the lawmakers, that the thing excepted would have been within the general words had not the exception been made.

Carriers—Who Are Passengers Free Transportation—“Passengers for Hire.”*—Employees of the railway mail service, traveling in the postal or mail cars in charge of the mails under a contract between the government and the carrier for the carriage of mail and the mail clerks, are “passengers for hire,” to whom the carrier owes the same duty that it owes to the passengers riding upon the train in so far as its liability for personal injuries arising from its negligence is concerned.

Statutes—Construction—Exceptions in Penal Statutes.—Exceptions in penal statutes ought to be liberally construed in favor of him who is charged with a violation of the statute.

Carriers—Interstate Transportation—Passes.—The Hepburn act (Act June 29, 1906, c. 3591, § 1, par. 4, 34 Stat. 584 [U. S. Comp. St. Supp. 1909, p. 1151]), providing that no carrier subject to the provisions of the act shall issue in interstate commerce free transportation, except to railway mail service employees, cannot be construed to prohibit the issuance of a free pass to an employee of the railway mail service for transportation of such employee while not in the actual discharge of his official duties.

Carriers—Injuries to Passenger—Free Transportation—Violation of Statute.—Where an interstate carrier issued free transportation to an employee of the railway mail service for use by such employee while not on duty, it could not avoid liability to the personal representatives of such employee for its negligence in causing his death by alleging that such transportation was issued in violation of the Hepburn act (Act June 29, 1906, c. 3591, § 1, par. 4, 34 Stat. 584 [U. S. Comp. St. Supp. 1909, p. 1151]).

Carriers—Who Are Passengers—Contract of Transportation.—The relation of carrier and passenger may exist independent of any contract between the parties for transportation.

Carriers—Who Are “Passengers.”†—The test in determining who are passengers is whether the person desiring passage in good faith

*See foot-note of *Barker v. Chicago, etc., Ry. Co.* (Ill.), 35 R. R. 470, 58 Am. & Eng. R. Cas., N. S., 470.

†For the authorities in this series on the subject of the beginning of the relation of carrier and passenger, see *Lockwood v. Boston Elev. Ry. Co.* (Mass.), 31 R. R. 395, 54 Am. & Eng. R. Cas., N. S., 395, where all those preceding it are collected; *Payne v. Springfield St. Ry. Co.* (Mass.), 33 R. R. 186, 56 Am. & Eng. R. Cas., N. S., 186.

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offered himself for the purpose of being carried as a passenger, and that he was as such accepted and received by the carrier, who undertook to transport him.

Appeal from District Court, Second District; J. S. Howell, Judge.

Action by Mary R. Schuyler and others against the Southern Pacific Company. From a judgment for plaintiffs and from an order overruling a motion for a new trial, defendant appeals. Affirmed.

P. L. Williams, George H. Smith, and John G. Willis, for appellant.

Agee & McCracken, for respondents.

STRAUP, C. J. 1. This is an action brought by the plaintiffs and respondents to recover damages for the death of Charles A. Schuyler, alleged to have been caused by the defendant's negligence while a passenger on one of defendant's trains. A verdict was rendered for the plaintiffs on the 20th day of August, 1908. It is not made to appear when the judgment was entered. It is shown that the judgment was recorded on the 17th day of December, 1908. A notice of appeal was served and filed the 1st day of April, 1909. The statute provides that an appeal may be taken within six months from the entry of the judgment. While no motion is made to dismiss the appeal, it nevertheless is urged that we are without jurisdiction to entertain the appeal because it was not taken in time. It is assumed by the respondents that the judgment was entered on the day the verdict was rendered, and it is claimed by them that it is not shown by the bill of exceptions that a motion for a new trial was made, or, if made, when it was overruled, and therefore it is not affirmatively made to appear that the appeal was taken within six months from the entry of the judgment, or the overruling of the motion for a new trial. Though the judgment was entered on the day the verdict was rendered, yet we think the appeal was in time, for it is sufficiently disclosed by the bill of exceptions that a motion for a new trial was made within time, and that it was overruled on the 4th day of January, 1909, at which time the judgment became final. The appeal was taken within six months from that time.

2. It is alleged in the complaint that the defendant is a common carrier of passengers for hire and owned and operated a railroad from Ogden, Utah, to San Francisco, Cal.; that, in connection with the business of carrying passengers for hire, the defendant had entered into engagements with the government of the United States to transport and carry between the points named United States mail, mail clerks, and employees employed in the railway mail service, including the deceased,

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for which the defendant received compensation from the government of the United States; that it was necessary for the deceased, who was an assistant chief mail clerk, in the discharge of his duties, to be in and ride on the mail cars operated by the defendant in carrying mails, and while he was "necessarily in a certain mail car" operated by the defendant in one of its trains from Oakland to Ogden, and while he was being so transported by the defendant "for a consideration and under arrangements between it and the government of the United States," the train between Gartney and Lucin stations, in Utah, was derailed through the defendant's negligence, and the deceased killed. A petition was filed by the defendant to remove the case to the Circuit Court of the United States in and for the District of Utah on the ground "that the suit herein is of a civil nature at law, arising under the Constitution and laws of the United States (section 8 of article 1), declaring that Congress shall have power to 'establish postoffices and post roads,' also 'to regulate commerce with foreign nations and among the several states.' Also under the act of Congress of the United States approved June 13, 1898, and June 9, 1896, and acts amendatory thereof and supplemental thereto, relating to the transportation of railway mail clerks, and other officers of the postoffice department of the government of the United States; also the act of March 3, 1897, pertaining to messenger service in connection with railroads, etc.; also act of Congress of the United States; approved February 4, 1887, and acts amendatory thereof, including the act approved June 29, 1906." The court denied the motion to remove. Complaint is made of this ruling. It is especially urged by the appellant that plaintiff's case necessarily involves a construction of section 1, par. 4, of the Hepburn act (Act June 29, 1906, c. 3591, 34 Stat. 584; Fed. Stat. Ann. Supp. 1907, p. 169 [U. S. Comp. St. Supp. 1909, p. 1151]), which prohibits common carriers engaged in interstate commerce from issuing or giving free interstate transportation for passengers, except the persons and classes therein specified. It is contended that the case involves the question as to whether under the statute a clerk in the railway mail service of the United States, when not engaged in the discharge of his duties as a mail clerk, and when traveling for his own convenience and purpose wholly unconnected with any official duty, can lawfully be given free interstate transportation as in the act provided for the free transportation of railway mail clerks. The appellant claims that the statute forbids free interstate transportation for mail clerks in such case, and that the deceased on his trip from San Francisco to Ogden, when the derailment occurred, was so traveling for his own convenience wholly unconnected with any official duty, and that he was therefore not a passenger, but a trespasser. It, how-

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ever, is averred in the complaint that the deceased was transported by the defendant under arrangements between it and the government of the United States by which the defendant engaged for a consideration and upon compensation received by it from the government of the United States to safely transport the deceased between the points named, and that the defendant, under such arrangement, had undertaken to so carry and transport the deceased. On the face of the complaint, it is not made to appear that the deceased's right to transportation was acquired by virtue of the federal law referred to, nor that the construction of a federal law is involved, nor that plaintiffs' case is dependent upon a federal law. Nor is it alleged in the complaint that the deceased was not in the discharge of his public duties, nor that he was traveling for his own convenience. The allegations of the complaint show rather the contrary. To make a suit arise under a law of the United States, the plaintiff must claim some legal right under such law to sustain his cause of action, which legal right is controverted by the defendant; and to make a case removable from the state court to the Circuit Court of the United States, under the present general statute, on the ground that it arises under a law of the United States, it must appear from the plaintiff's statement of his cause of action in the initial pleading that it does so arise. Moon on Removal of Causes, §§ 101, 104. A case cannot be removed simply because in the progress of the litigation it may be necessary to give a construction to the Constitution or laws of the United States. It not being made to appear by the plaintiffs' complaint that a federal law is involved, the court did not err in denying the motion for removal.

3. The suit was brought by Mary R. Schuyler, the deceased's widow, and his minor children by a guardian ad litem. The appointment of the guardian was alleged in the complaint. When the plaintiffs offered in evidence the order of the appointment, the defendant objected on the grounds that the statute only provides for the appointment of a guardian ad litem in a pending action, and then only for nonresident minor defendants, that the minor plaintiffs were nonresidents, and that no action was pending when the order appointing the guardian was made. In giving the statute (sections 2907, 2908, Comp. Laws 1907) such a construction we think the appellant "sticks in the bark." We think the statute contemplates and provides for the appointment of a guardian ad litem for resident and nonresident minor plaintiffs as well as resident and nonresident minor defendants.

4. In the defendant's answer, it was admitted that the deceased was in the employ of the government of the United States as a railway mail clerk, and that the defendant was a common carrier for the transportation of property and passen-

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gers for hire, as averred in the complaint, and "that contractual relations existed between the defendant and the government of the United States with respect to the carrying of certain United States mail and certain employees of said government to whom was intrusted the supervision and care of such mails as were by defendant transported under the agreement aforesaid, and that the defendant received compensation therefor." It denied the alleged negligence, and pleaded that the deceased was only entitled to be upon the mail cars when he was in the discharge of his duties as mail clerk, and that he, without the consent and knowledge of the government of the United States or the defendant, and in violation of the agreement existing between the defendant and the government, and with the intent, and for the purpose of deceiving the government and the defendant and avoiding the payment of fare, entered the mail car, and wrongfully, fraudulently, and in violation of law, and without the consent and knowledge of the defendant, remained in the car, and attempted to secure transportation therein, and, while he was so wrongfully and fraudulently upon the car, he received the injuries which resulted in his death. Upon these issues, the court instructed the jury that if they found from the evidence that the deceased was traveling on the defendant's train, and was not performing duties relating to the mail service, but was traveling "simply for his own purpose unconnected with any official duties," he was not a passenger for hire, but a trespasser to whom the defendant would not be liable for the alleged negligence and resulting injury. The appellant contends that the evidence without dispute shows that the deceased was traveling on the defendant's train "simply for his own purpose unconnected with official duties," and that the verdict which was rendered by the jury was therefore contrary to the evidence and against the charge.

The evidence without dispute shows the following facts: In November, 1906, the deceased, who then lived at Oakland, Cal., and who was in the employ of the United States mail service at San Francisco, was appointed an assistant chief clerk of the railway mail service with headquarters at Ogden, Utah. The Postmaster General issued to him the following commission: "Post-Office Department, Washington, D. C. To Whom Concerned: The bearer hereof, Charles Albert Schuyler, has been appointed an assistant chief clerk, railway mail service, with headquarters Ogden, Utah, and will be obeyed and respected accordingly. Railroad companies are requested to extend to the holder of this commission the facilities of free transportation on the lines named on opposite page. If fare is charged receipt should be given. Valid only when issued through the office of the Second Assistant Postmaster General and countersigned by James E. White." This was signed by G. B.

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Cortelyou, the Postmaster General, and countersigned by James E. White, general superintendent. On the opposite page were the words: "Good between all stations Utah, Idaho, Nevada, California, Montana and Colorado." The position to which the deceased was appointed embraced the territory of Utah, a portion of Montana and Idaho, and a small portion of Nevada and Colorado. It did not include any portion of California. The chief clerk at Ogden, the assistant chief clerk, and all mail clerks running between San Francisco and Ogden, were under the supervision of the general superintendent at San Francisco. The superintendent testified that the deceased was required to perform "all of the duties assigned to him (by the chief clerk at Ogden), office duties assigned to him by the chief clerk, in addition to that, took the place of the chief clerk in the chief clerk's absence, and became the acting chief clerk, with all of the powers of chief clerk; performed all the duties of the chief clerk, had the general duties assigned him of overseeing the service. * * *" "The chief clerk, or assistant chief clerk" was required to "pay particular attention to the service, if he is properly performing his duties, whenever he is around a mail car, whenever he is at a transfer station or comes in contact with railway postal clerks, in other words, anything that pertains to the transportation of mails under his care, and carried with it the responsibility to all officials of the service. * * * All officials of the service are expected and are instructed to pay particular attention to the service, whether or not it comes within his particular scope. * * * We have general unwritten laws or regulations requiring every official of the service to be on watch regarding the service. * * * The chief clerk at Ogden had jurisdiction only over the helpers running west on the line on which the accident happened. * * * All postal clerks work directly under the chief clerk of the local district. The chief clerk is required to report at the end of the probationary term of the clerk, as to his fitness for permanent employment. On that report I base my recommendation to the department at Washington, and the report of the chief clerk determines, in a large measure, whether or not the clerk shall be retained. The duty of the assistant chief clerk, if he comes in contact with the postal clerks, whether or not he finds an irregularity, is to make a report to his chief clerk immediately upon his return. Blank forms are furnished to all offices for such purposes." The chief clerk at Ogden testified: "The duties of an assistant chief clerk were an assistant to the chief clerk in the performance of the duties and attending to any matters that might be assigned to him by the chief clerk. At any time he would be on the road he would be expected to ride in the mail car and take notice of anything that would be for the improvement or betterment of the serv-

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ice, either in the plan of work pursued by the clerks or the distribution." The deceased, at Ogden, received a telegram from Oakland announcing the death of his child. With the permission of the chief clerk at Ogden, he took the first fast mail train for California. The chief clerk furnished him a portable cot, blankets, and bedding to occupy quarters in a mail car. When he left Ogden for Oakland, there was no official business requiring him to make such a trip. No instructions were given him in respect of any business or duties pertaining to the service. The chief clerk at Ogden in supervising the business of his territory was required, from time to time, to go on the road on official business. But he had always performed such duties himself. The performance thereof had at no time been required of the deceased. When the deceased arrived at San Francisco, he there called on the general superintendent, and informed him of the death of the deceased's child. No matters were discussed, and no transactions were had relating to the mail service. Nothing was talked about between them except the deceased's misfortune and bereavement. The superintendent inquired of him when he intended to return to Ogden. He answered the following day. They discussed the train which he would take and the time he would reach Ogden. On the 12th day of January, 1907, the deceased, on his return trip, at Oakland, in the presence of the train agent and the conductor in charge of the train about to leave for Ogden, entered a mail car with his grips. The evidence of his right to transportation on the defendant's train was the commission issued by the Postmaster General. There were some mail clerks in the car. He, however, had no supervision or direction over them. While it is made to appear that in going from Ogden to Oakland and in returning from Oakland to the place of the derailment the deceased traveled in a mail car, yet it is not made to appear what, if anything, he did in the mail car, or that he rendered any service, or performed any duties pertaining to the railway mail service. We think the only conclusion authorized from the evidence is that he was traveling in the mail car on account of matters personal to himself and wholly unconnected with his service to the government. We do not say that the commission issued to the deceased, if recognized and accepted by the defendant, did not entitle him in such case to the transportation in question, or if the commission was recognized and accepted by the defendant, and by virtue of it the defendant assumed and undertook to carry and transport the deceased, and he in good faith believed the commission entitled him to the transportation, that the deceased was a trespasser on the defendant's train, or that it was not liable to the plaintiffs for the consequences of its alleged negligence, though under the Hepburn act the defendant could not lawfully give him free transporta-

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tion, except when he was on duty. But in the complaint it is in effect alleged that the defendant had agreed and received compensation to carry the deceased when he was in the discharge of duties as clerk of the railway mail service, and that the deceased was in the mail car in the discharge of such duties. The defendant admitted that it had entered into arrangements with the United States government to carry the deceased in such case, but alleged that he was not in the discharge of duties, and had not entered the car for any such purpose, but, on the contrary, had entered the car, and knowingly and fraudulently and without the knowledge or consent of the defendant attempted to ride therein in violation of the defendant's agreement with the government to carry mail clerks. The court gave the jury binding instructions to render a verdict for the defendant if they found that the deceased was traveling in the mail car, and was "not performing any of his duties as such assistant chief clerk on said train," but was traveling "simply for his own purposes unconnected with any official duties." The court conditioned the right of recovery upon the performance of such duties on the train by the deceased, regardless of all other questions. It was the duty of the court to instruct the jury in matters of law; and the jury, as matter of duty, were bound to follow the instructions. Right or wrong, they were the law of the case for the jury to obey and follow. This they did not do. We find no evidence to warrant a finding of the condition upon which the court instructed the jury the plaintiffs could recover.

In this connection, the court also charged the jury that it was undisputed that the deceased was an employee of the railway mail service, and that at the time of the injury he was in a mail car "on the defendant's line of road, and I charge you the presumption is that he was there lawfully and rightfully in the discharge of his official duties as such employee, and the burden is upon the defendant to overcome that presumption by affirmative proof and by a preponderance of all the evidence;" but that the presumption would be overcome if it was shown by affirmative proof and by a preponderance of the evidence that he was not in the discharge of his official duties. The relation of carrier and passenger for hire between the defendant and deceased was in effect alleged by the plaintiffs, or such a relation as gave the deceased rights of a passenger, and imposed upon the defendant corresponding duties and obligations of a carrier of passengers. Such a relation was denied by the defendant. The burden was upon the plaintiffs, not the defendant, to establish it. That burden did not shift, but rested upon the plaintiffs throughout the case. And, if upon all the evidence it was not established by a fair preponderance, the plaintiffs, and not the defendant, must fail. The charge of the court is not only in

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conflict with these well-recognized principles, but also invaded the province of the jury on the weight to be given a mere inference of fact. It in effect told the jury that a certain presumption of law arose; that is, that a definite probative weight in law attached by reason of certain undisputed facts, and that the burden was cast on the defendant to overcome it by affirmative proof and by a preponderance of the evidence. What the court thus incorrectly characterized a presumption of law by instructing the jury to give it a definite probative effect was, at most, a mere inference of fact, and a fact, too, which, under the charge of the court and the law of the case as given the jury, was essential to plaintiff's right of recovery. That is to say, the court, in other portions of the charge bound the jury to find that the deceased was in the discharge of his duties as a mail clerk before they could properly render a verdict for the plaintiffs, and here told them that such fact was established as matter of law by the undisputed proof of certain other facts, and then cast the burden on the defendant to overcome such presumption by affirmative proof, and by a preponderance of the evidence that the deceased was not in the discharge of his duties. An evidentiary showing, however strong, made by a party having the affirmative of an issue, whether by direct evidence of the testimony of witnesses or indirect evidence of inferences and presumptions, does not cast the burden on the other party to prove the negative, but the onus probandi in either case remains throughout with him who has the affirmative. The court, therefore, in directing the jury to give a definite probative effect to the admitted facts, and in casting on the defendant the burden of proving the negative to overcome such effect, committed error.

It is not necessary to express an opinion on the question presented as to whether the Hepburn act permits an interstate carrier to give free interstate transportation to railway mail clerks when not on duty, for the reason that it is alleged in the complaint and admitted in the answer that the arrangement existing between the defendant and the government of the United States for the transportation of the deceased was for hire and when he was in the discharge of duties in the railway mail service. It was alleged in the complaint, and denied in the answer, that he was in the discharge of such duties. With respect to the relation between the defendant and the deceased that was the only issue submitted to the jury. And, as already held by us, we do not find sufficient evidence to support the verdict which was rendered thereon.

For the reasons given, the judgment is therefore reversed, and the case remanded for a new trial, costs to appellant.

FRICK and McCARTY, JJ., concur.

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On Rehearing.

STRAUP, C. J. A petition for rehearing was filed on behalf of respondents. They urged that we had overlooked evidence to show that the deceased was traveling in the mail car in discharge of duties. They further urged that, though he was not in the discharge of duties, nevertheless, upon the undisputed evidence showing that the appellant received him as a passenger and as such undertook to carry and convey him and that his death was caused by its negligence, the respondents were entitled to recover as matter of law. A rehearing was granted, and the case reargued and resubmitted.

We have reread the record, and again reached the conclusion that there is no evidence to support a finding that the deceased was traveling on appellant's train in the discharge, or in pursuance, of duties pertaining to the railway mail service. Upon the evidence adduced the only permissible inference is that he left Ogden and went to Oakland solely on account of the death of his child, and that he was on the return journey of such a mission when the train was derailed. Whatever presumption might be indulged under other circumstances that he was in the discharge of railway mail duties from the facts that he was a railway mail clerk and was in a mail car is entirely overcome by the affirmative and direct showing that there was no business or engagement relating to his service which occasioned or required the trip to be made by him; that no directions, instructions, or requests were given to or made of him in respect thereof; that duties on the road had theretofore always been performed by his chief and not by the deceased; and that the trip was occasioned solely on account of the death of his child.

The other proposition is more difficult. The claims made by the respondents in that regard are: (1) That under the Hepburn act the appellant could lawfully give, and the deceased receive, free transportation, it being conceded that he was a railway mail service employee, though he was not on duty and was traveling on account of mere personal matters; and (2) though the act did not permit the giving of free transportation in such case, and though the appellant could not lawfully permit the deceased to be carried on its train by virtue of the commission which was issued to him unless he was on duty, nevertheless the appellant, having received the deceased upon its train and permitted him to ride in the mail car, and by virtue of the commission undertook to transport him as a passenger regardless of the question whether he was or was not on duty, must be held responsible for the breach of duty so assumed and undertaken by it, to the same extent that it is liable to passengers for hire. On the other hand, it is asserted by the appellant that the respondents, having alleged in the complaint that

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the deceased was in effect a passenger for hire arising out of particular alleged facts—a contract between the government and the appellant to carry mails and mail clerks, including the deceased, for which appellant received and was paid compensation, and that under such arrangement, and for such consideration, the appellant had undertaken to carry the deceased from Oakland to Ogden, that the deceased in the discharge of duties as a railway mail clerk was required to be in the mail cars operated by the appellant, and “was in said car with the knowledge and consent of the said defendant, its agents and servants, as such clerk, and in the discharge of duties as such” at the time of the derailment—must recover, if at all, upon proof of the particular relation of passenger and carrier as alleged, and that they cannot be permitted to recover on the theory that the deceased was a gratuitous or other passenger; that under the Hepburn act neither the appellant nor its agents in charge of its train could lawfully permit the deceased to ride on his commission when he was not on duty, nor could it or its agents otherwise lawfully permit him to ride gratuitously, and, since the deceased was riding on appellant’s train by virtue of his commission when not on duty, he was engaged in the commission of an act in violation of law, and was hence a trespasser to whom appellant owed no duty except to refrain from willfully injuring him.

It undoubtedly is true that a plaintiff may not declare on one theory and recover on the proof of another. He may not for instance declare on one or several alleged acts of negligence, and recover on the proof of another or others. So, in a complaint, a plaintiff seeking to recover from a carrier for the negligent killing of a passenger, no recovery can be had unless the relation of carrier and passenger is shown, although the facts are such as to warrant a recovery in the absence of such relation for ordinary negligence in injuring a person not a passenger. The duty owing, the measure of liability, and the degree of care required are different. *Chicago & E. I. R. Co. v. Jennings*, 190 Ill. 478, 60 N. E. 818, 54 L. R. A. 827. If, therefore, in the complaint a particular kind of passenger is alleged, may recovery be had on the proof of a different kind? That is, if in the complaint it is alleged that the passenger was one for hire, may recovery be had if the proof shows that he was a gratuitous passenger? The rule at common law obtained, and, as stated in 1 Chitty on Pleadings, p. 392, that “if the plaintiff, though needlessly, describe a tort and the means adopted in effecting it with minuteness and particularity, and the proof substantially vary from the statement, they will be at fatal variance which will occasion a nonsuit.” But by sections 3001, 3002, 3003, Comp. laws 1907, it is by our Code provided:

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"No variance between the allegations in a pleading and the proof is to be deemed material, unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits. Whenever it appears that a party has been so misled, the court may order the pleading to be amended, upon such terms as may be just.

"Where the variance is not material, as provided in the next preceding section, the court may direct the fact to be found according to the evidence, or may order an immediate amendment, without costs.

"Where, however, the allegation of the claim or defense to which the proof is directed is unproved, not in some particular or particulars only, but in its general scope and meaning, it is not to be deemed a case of variance within the last two sections but a failure of proof."

In speaking of such codes, Mr. Bates, in his work on Pleading and Practice (volume 1, p. 512), says: "Under the Code no variance is material unless it has actually misled the adverse party to his prejudice on the merits, and no allegation is material unless essential to the claim or defense. The evident object of the Code is to vest in the court a discretion, where it can be done without surprise or injury, to try the case on the evidence outside of the pleadings, and if objection be made to allow the pleadings to be conformed to the evidence at once without terms, and where there is no objection to refuse to reverse on account of the variance." Had respondents merely averred that the appellant was a common carrier of passengers, that the deceased was a passenger on one of its trains, and that it had assumed and undertaken to transport him as such, such allegations would have been sufficient to show the relation of passenger and carrier and the duties of a carrier owing by it to him, and any evidence would have been permissible thereunder which tended to show the relation of carrier and passenger, whether for hire or that of a gratuitous passenger. *Birmingham Ry. Lt. & P. Co. v. Adams*, 146 Ala. 267, 40 South. 385, 119 Am. St. Rep. 27; *Lemon v. Chanslor*, 68 Mo. 340, 30 Am. Rep. 799; *Ohio & M. R. Co. v. Craucher*, 132 Ind. 275, 31 N. E. 941; *Gulf, Colo. & S. Fé R. Co. v. Wilson*, 79 Tex. 371, 15 S. W. 280, 11 L. R. A. 486, 23 Am. St. Rep. 345; 2 Bates, Pl. & Pr. p. 1174. In the case of *Gulf, Colo. & S. Fé R. Co. v. Wilson*, *supra*, it was held that proof that plaintiff was a United States mail agent on defendant's car in charge of mail under an allegation that he was a passenger does not constitute a variance. Nor are such general averments of the relation of carrier and passenger, as stated, open to the objection that they are statements of mere conclusions. *Ohio & M. R. Co. v. Craucher*, *supra*. If the duties imposed by law for the carriage of a passenger for hire were other than or different from those imposed

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for the carriage of a gratuitous passenger, or if a different or higher degree of care was required in the one than in the other, it can readily be seen that no recovery could be had under an averment that the injured person was a passenger for hire on proof that he was a mere gratuitous passenger. But it is now well settled that there is no difference in the degree of care required of carriers, nor in the measure of liability, in the transportation of passengers for hire and gratuitous passengers. It was wholly unnecessary for respondents to aver with minuteness the particular facts, as was done, upon or out of which the relation of carrier and passenger was based or grew. There must, of course, be sufficient averments and evidence to support a finding of the relation of carrier and passenger, else no recovery can be had. The essential in its general scope and meaning is the averment and proof of that relation. It undoubtedly was sufficiently averred in the complaint, and, though the evidence does not support the averment that the deceased was on the defendant's train in the discharge of duties pertaining to the railway mail service, and hence does not show that he was a passenger for hire, as was in effect averred, nevertheless it does support a finding of the relation of carrier and passenger; that is, the evidence does support a finding that the appellant received and accepted the deceased for the purpose of being conveyed in the mail car from Ogden to Oakland and from Oakland to Ogden, and that it undertook to so transport him in virtue or by reason of the commission held by him.

The further question to be determined is whether such relation and appellant's undertaking to transport the deceased, and its alleged breach of duty resulting in his death, are so conclusively made to appear as to entitle the respondents to a directed verdict in such issues. If they were entitled to such a direction, then the errors committed by the trial court, and referred to in our opinion on the former hearing, are harmless. That the car was derailed through the negligence of appellant as alleged in the complaint, and that the deceased was killed by reason of such derailment, is, upon the record, not open to controversy. No substantial conflict is presented by the evidence on that subject. The serious question is: Does the evidence conclusively show the relation of carrier and passenger? On such question we think the following facts are conclusively made to appear: The deceased, who was a railway mail clerk in the service of the government of the United States, left Ogden and went to Oakland solely on account of the death of his child. He remained at Oakland a few days. When there, he went on board appellant's train on his return trip. When he left Ogden, he entered a mail car in appellant's train. The evidence of his right to enter the mail car and be carried by appellant was the commission issued to him, which, on its face, entitled him to

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transportation between all stations in Utah, Nevada, and California. The commission on its face granted "the facilities of free transportation on the lines named," regardless of the question whether he was or was not in the discharge of public duties. It was issued to him before the Hepburn act took effect. The derailment and the deceased's death occurred 14 days after the act took effect. It was admitted by the parties on the trial that the deceased used the commission on the trip "as the evidence of his right to ride—the evidence of his right of transportation"—and that no question would be raised with respect to the exhibition of the commission to the conductor in charge of the train.

The deceased at Oakland, in the presence of the conductor and train agent, and with their knowledge, entered a mail car in a train about to leave for Ogden, and impliedly with their consent, at least without their objection. In view of the stipulation, and upon the whole record, we think the only permissible inferences are that the deceased, both in going to and in returning from Oakland, rode in the mail car with the knowledge and consent of appellant's conductors in charge of the train; that the appellant, its conductors and agents in charge of the train, and the deceased, in good faith, assumed and believed that the commission entitled him to so ride and to be transported in the mail car, regardless of the fact whether he was or was not on duty, and that the commission was so treated and so recognized by them, and as "the evidence of his right of transportation." There is nothing in the record to support the allegations in the answer that the deceased entered the mail car without appellant's knowledge or consent, or against its will, or with the intent, or for the purpose, of deceiving or defrauding the appellant or the government, or that he otherwise entered the car clandestinely or fraudulently, or in bad faith, or with any wrongful design or purpose. The evidence, quite conclusively, shows the contrary. The deceased was therefore not a trespasser. To be a trespasser, it was essential that his presence on appellant's train was without its knowledge or consent, or was gained or obtained through fraud or deceit.

Now, what legal liability attaches for an injury inflicted upon one through the carrier's negligence in being transported under such circumstances? The appellant asserts not any, for the Hepburn act forbids such a transportation when the deceased was not on duty. Section 1, par. 4, of the act (34 Stat. 584; Fed. Stat. Ann. Supp. 1907, p. 169), is as follows: "No common carrier subject to the provisions of this act, shall, after January 1, 1907, directly or indirectly, issue or give any interstate free ticket, free pass, or free transportation for passengers, except to its employees and their families, its officers,

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agents, surgeons, physicians, attorneys at law; to ministers of religion, traveling secretaries of railroad Young Men's Christian Associations, inmates of hospitals, and charitable and eleemosynary institutions, and persons exclusively engaged in charitable and eleemosynary work; to indigent, destitute, and homeless persons, and to such persons when transported by charitable societies or hospitals, and the necessary agents employed in such transportation; to inmates of the national homes or state homes for disabled volunteer soldiers, and of soldiers' and sailors' homes, including those about to enter and those returning home after discharge, and boards of managers of such homes; to necessary caretakers of live stock, poultry, and fruit; to employees on sleeping cars, express cars, and to linemen of telegraph and telephone companies; to railway mail service employees, post-office inspectors, customs inspectors, and immigration inspectors; to newsboys on trains, baggage agents, witnesses attending any legal investigation in which the common carrier is interested, persons injured in wrecks, and physicians and nurses attending such persons: Provided, that this provision shall not be construed to prohibit the interchange of passes for the officers, agents, and employees of common carriers, and their families; nor to prohibit any common carrier from carrying passengers free with the object of providing relief in cases of general epidemic, pestilence or other calamitous visitation. Any common carrier violating this provision shall be deemed guilty of a misdemeanor, and for such offense, on conviction, shall pay to the United States a penalty of not less than one hundred dollars nor more than two thousand dollars, and any person, other than the persons excepted in this provision, who uses any such interstate free ticket, free pass or free transportation shall be subject to a like penalty." Before the passage of this act, it, of course, was lawful for a carrier to give free interstate transportation for passengers; and, while there is no direct evidence of it in the case, we think from what was made to appear in argument we may assume that, before this act took effect, commissions to railway mail service employees were honored by carriers on the lines designated thereon, and such employees given the facilities of free transportation, whether on duty or not. And upon the record we think we are justified in assuming that after the act took effect, and at the time of the transportation in question, the appellant and the deceased in good faith believed that the provisions of the Hepburn act did not forbid a carrier from transporting a railway mail service employee, on his commission issued to him, and over the lines designated thereon, though he was not on duty. This assumption, of course, is wholly immaterial to the construction of the act, but it is important as bearing on the question whether the deceased was riding on the mail car with appellant's consent or against its will. In June, 1907, about

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five months after the derailment, in response to an inquiry made of them, the members of the Interstate Commerce Commission expressed their views that under the Hepburn act a carrier who knowingly permitted railway mail service employees to use, and that such employees who accepted, free transportation when not in the discharge of their public duties, and when traveling unofficially, and for their personal benefit or pleasure, would subject themselves to the penalties of that act. This conclusion was reached upon a classification of the persons enumerated in the exceptions of the act, and who might receive free transportation, into three groups: (1) The "persons actively connected with the operation of railroads or with the administration in various capacities of their affairs;" (2) the "persons who are either engaged in administering charities or are the object of charitable aid;" and (3) persons "who have to do with the affairs of persons, firms, or corporations, engaged in business along the line of railroads * * * and not in the employ of the railway companies." To those classified in the first and second groups, it is held by them, free interstate transportation may be given without offending the provisions of the act, though the transportation is wholly for their personal pleasure and benefit; but to those classified in the third group, free interstate transportation cannot lawfully be given to or received by them "except in connection with the actual performance of duties, or on the return journey." Had this ruling been made as the result of some hearing or proceeding before the commission involving the question, we might be inclined, though not required, to accept such a construction, even though it was not in accord with our own views. However, since it was a mere response in reply to a letter seeking the views of the members of the commission, apparently not upon an actual but a moot case, the ruling ought not be given the weight that otherwise should be given it had it been made under other circumstances. Notwithstanding the high regard entertained by us for the judgment of the members of the commission, we nevertheless are of the opinion that the construction placed by them on the Hepburn act in this regard is not the correct one. Congress, of course, could except any persons it desired from the operation of the general provisions of the act forbidding the giving of free interstate transportation for passengers. It made such exceptions. It is generally recognized that an exception of a particular thing from the operation of the general words of a statute shows that in the opinion of the lawmaker the thing excepted would be within the general words had not the exception been made. Tested by this principle, had the exception in respect of railway mail service employees not been made, would the carriage of such employees on mail cars in the discharge of duties pertaining to the railway mail service be in violation of the general

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provisions of the act? We think not. It is generally held by the courts that "a mail agent or postal clerk employed and engaged in the service of the government and traveling in the postal or mail car, in charge of the mails, under a contract between the government and the carrier for the carriage of mail and the mail clerks having lawful custody thereof, is a passenger for hire to whom the carrier owes the same duty that it does to passengers riding upon the train, in so far as its liability for personal injuries arising from its negligence is concerned. The compensation for the carriage of such agents or clerks must be regarded as included in that paid by the government for the carriage of mails." Moore on Carriers, p. 577. Such carriage, under such circumstances, in no sense would be free transportation, but transportation for hire, paid for by the government. We cannot believe it was thought by Congress that, if the exception relating to railway mail service employees was not made, the carriage of such persons in charge of the mails in mail cars or engaged in duties pertaining to the railway mail service under a contract between the government and the carrier for the carriage of mails and mail clerks would, in any sense, be free transportation within the general words, and in violation of the general provision, of the act forbidding free interstate transportation. We think it manifest that something more and other than that was intended by such exception.

In the act is contained a number of exceptions. Some are without limitation or restriction; others are limited and restricted. Thus, "necessary caretakers of live stock," etc., "employees on sleeping cars," "newsboys on trains," and other exceptions specified in the act, have in themselves restrictive or qualifying terms. But in the exception "its (the carrier's) employees and their families, its officers, agents," etc., "ministers of religion," indigent persons, inmates of national or state homes, etc., are without terms of restriction or limitation. So is the exception as to "railway mail service employees, postoffice inspectors, customs inspectors and immigration inspectors." We see no more license to read into this exception words of restriction or limitation than into the first, second, third, or fourth exceptions specified in the act. Because such words are more easily read into this exception than into the second, third, or fourth is no reason why they should be read into it. They can as readily be read into the first as into this exception. That is, the words "when on duty" can as readily be read into the exception pertaining to the carrier's employees as in the exception pertaining to railway mail service employees. The fact that the exception pertaining to "the employees on sleeping cars, express cars," is restricted and limited, and that the exception to "railway mail service employees" is not restricted or limited, is, we think, significant, as bearing upon the intention that the former was in-

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tended to be restricted, and the latter not. If Congress intended the limitation or restriction to apply to both, such an intention could not very easily have been expressed. We can see good reason why it was desired to restrict the one and not the other. We need not, however, speculate on that, for the intention to restrict the one and not the other is, we think, made manifest by the language employed. Furthermore, exceptions in penal statutes ought to be liberally construed in favor of him who is charged with the violation of the provisions of the statute. We are therefore of the opinion that the Hepburn act does not forbid a carrier from giving railway mail service employees free interstate transportation when not on duty and when traveling for their own benefit or pleasure.

Though the construction which we have given the Hepburn act should not be correct, and though it was unlawful for the appellant to give, and the deceased to receive, free transportation on his commission, when he was not on duty, yet we are also of the opinion that under all the circumstances of the case the appellant, having undertaken and assumed to carry and transport the deceased as a passenger by reason of the commission, cannot escape liability for the consequences of its negligence on that ground. Moore, in his work on Carriers (page 570), says: "A person who travels upon a pass unlawfully issued to him in violation of a law prohibiting the issuing of free passes is not a trespasser, but is entitled to the rights of a passenger." The same principle is stated in 5 A. & E. Ency. Law (2d Ed.) p. 508. And to that effect are the following cases: *Bradburn v. Whatcom Co. Ry. & L. Co.*, 45 Wash. 583, 88 Pac. 1020, 14 L. R. A. (N. S.) 526; *Buffalo, etc., R. Co. v. O'Hara*, 3 Penny (Pa.) 190; *McNeill v. Durham & C. R. Co.*, 135 N. C. 682, 47 S. E. 765, 67 L. R. A. 227. In the last-named case numerous cases bearing on the subject are cited and reviewed. These cases proceed upon the theory, and, as stated by the court in the case of *Delaware, Lackawanna & Western R. Co. v. Trautwein*, 52 N. J. Law, 169, 19 Atl. 178, 7 L. R. A. 435, 19 Am. St. Rep. 442, "that a railroad company having accepted a passenger is under an obligation to take due and reasonable care for his safety, and that that obligation arises by implication of law, independent of contract. To give the plaintiff a standing in court to sue for the injury, she has no need of the aid of a contract which was illegal," and that the act of traveling on a pass forbidden by law is not the contributing cause of the injury. The principle involved is analogous to that applied where, by the weight of authority, it has been held that a carrier, having accepted one as a passenger violating a statute prohibiting travel on Sunday, owes to him "the same duty as if he were lawfully traveling, and is responsible for a failure to perform it, the same in the one case as in the other," and that "the gravamen of the action is the

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breach of the duty imposed by law upon the carrier of passengers to carry safely, so far as human skill and foresight can go, the persons it undertakes to carry. This duty exists independently of contract, and although there is no contract in a legal sense between the parties. Whether there is a contract to carry, or the service undertaken is gratuitous, an action on the case lies against the carrier for a negligent injury to a passenger. The law raises the duty out of regard for human life, and for the purpose of securing the utmost vigilance by carriers, in protecting those who have committed themselves to their hands." *Carroll v. Staten Island R. Co.*, 58 N. Y. 126, 17 Am. Rep. 221.

We are aware some courts have held that "the relation between carrier and passenger is contractual and is created only by contract, express or implied" (*Farley v. Cincinnati H. & D. Co.*, 108 Fed. 14, 47 C. C. A. 156), upon which the conclusion may be based that if there is no valid contract of carriage, either express or implied, no relation of carrier and passenger is shown; and since the tort cannot be made to appear without proof of the illegal contract or transaction, on principle of public policy, a plaintiff who requires aid from an illegal transaction or contract to establish his demand must fail. Ordinarily the relation of carrier and passenger is created by contract, either express or implied. But the relation may exist independent of any contract between the parties themselves. We think this is clearly shown by Mr. Justice Douglas in the case of *McNeill v. Durham & C. R. Co.*, *supra*. We think his conclusion is supported by the weight of authority that "the law imposes upon a common carrier certain duties and liabilities which adhere to the nature of his calling. We prefer to adopt the more direct expression, and say that those duties and liabilities are imposed by law upon common carriers upon consideration of public policy independent of contract, and arise from the nature of their public employment." The same principle is stated by the Maryland court in *State, to Use of Abell, v. Western Maryland R. Co.*, 63 Md. 433, that "the duty of the carrier to convey safely does not result from the consideration paid, but is imposed by law," and that "a common carrier who accepts a party to be carried owes to that party a duty to be careful, irrespective of contract." Moore, in his work on Carriers (page 568), says: "Although it was for a long time urged on behalf of the carrier that it was liable only on its contract, and consequently that the law imposed no duty upon it in the case of a gratuitous undertaking to carry a passenger, there being no consideration, and therefore no legal contract, express or implied, the courts finally held otherwise, and it is now well settled that the carrier owes a duty to all upon its vehicle, independent of contract, even when the service is gratuitous, and that the breach of this duty is negligence, for which it is liable to the

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same extent that it is liable to passengers who pay fare. The confidence induced by undertaking any service for another is a sufficient legal consideration to create a duty in the performance of it." In *Fetter on Carriers of Passengers*, § 220, it is said: "It is now well settled that a carrier by its acceptance of a passenger as a passenger comes under an obligation to take due and reasonable care for his safety, which obligation arises by implication of law, and independent of contract, so that it may exist though the contract of carriage is illegal, or though there is no express contract of carriage." In *Wharton's Law of Negligence*, §§ 354, 355, it is said: "But there is now an almost uniform acquiescence in the true view that a person who undertakes to do a service for another is liable to such other person for want of due care and attention—the *diligentia* of the *bonus et diligens paterfamilias*—in the performance of the service, even though there is no consideration for such undertaking. * * * The carrier is bound from the time he assents thus to carry such person to exercise towards him the diligence, prudence, and skill of a good carrier in that particular kind of transport." The rule is stated by the English court in *Austin v. Great Western R. Co.*, L. R. 2 Q. B. 442, that "the right which a passenger by railway has to be carried safely does not depend on his having made a contract, but that the fact of his being a passenger casts a duty on the company to carry him safely."

It is unnecessary to further refer to the authorities or cases. We are of the opinion that, when a common carrier accepts a person as a passenger, he is not permitted to deny that he owes the duty of diligence, prudence, and skill, which as carrying on a public employment he owes to all his passengers, and that he cannot escape liability for negligent performance of that duty resulting in injury by urging that the pass or commission was issued, or the gratuitous carriage permitted by him in violation of law. Though the gratuitous carriage of the deceased by the appellant should under all the circumstances be held to have been in violation of the Hepburn act, in the commission of which both the deceased and the appellant were in *pari delicto*, and alike subject to the penalties of that act, yet that wrong in no sense influenced, nor was it a contributing cause of the wrong or negligence of appellant resulting from its breach of duty imposed upon it by law and arising from the facts of its acceptance of the deceased as a passenger and its undertaking to carry him as such. Such duties were not dependent upon the particular kind of contract of carriage existing between itself and the deceased, but upon the facts that it had accepted him as a passenger, and as such undertook to convey him. And we say here, as was said in the case of *Carroll v. Staten Island R. Co.*, *supra*, "this case, therefore, is not within the principle of many of the cases cited, which forbid recovery upon a contract made

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in respect to a matter prohibited by law, or for a cause of action which requires the proof of an illegal contract to support it." Mr. Justice Dixon, in the case of *Sutton v. Town of Wauwatosa*, 29 Wis. 21, 9 Am. Rep. 534, stated the proposition well when he said that "one party to the action, when called upon to answer for the consequences of his own wrongful act done to the other, cannot allege or reply the separate or distinct wrongful act of the other, done not to himself nor to his injury, and not necessarily connected with, or leading to, or causing or producing the wrongful act complained of," and that "himself guilty of a wrong, not dependent on nor caused by that charged against the plaintiff, but arising from his own voluntary act or his neglect, the defendant cannot assume the championship of public rights nor to prosecute the plaintiff as an offender against the laws of the state and thus to impose upon him a penalty many times greater than what those laws prescribe. Neither justice nor sound morals require this and it seems contrary to the dictates of both that such a defense should be allowed to prevail." For much stronger reasons should such principles be applied, when, as here, the defendant itself participated in the wrong charged against the deceased, the gratuitous carriage in violation of law. To permit the defense in such case is to allow the appellant to excuse itself or claim immunity from the consequences of its own tortious acts, negligently done to the deceased, on the ground that it and the deceased had been guilty of some other independent wrong, or violation of law, which in no sense influenced nor caused the tortious act of the appellant, and was not a contributing cause thereof, or of the injury, and bore no relation to either of a cause to the effect produced by it. We do not mean to say, and do not hold, that if it were only lawful for the deceased to have traveled on his commission when he was in the discharge of his public duties, and unlawful for him to do so when he was not on duty, and if he, without the knowledge or consent of appellant or its agents in charge of the train, had made an unauthorized use of the commission by traveling thereon when he was not on duty, that the relation of carrier and passenger would have been created rendering the appellant liable as in the case of a breach of duty in negligently transporting a passenger. A mere intruder or trespasser, of course, cannot create the relation of carrier and passenger by his own act. Nor can one create such relation by fraudulently or deceitfully making an unauthorized use of a commission, pass, ticket, or the like, nor by otherwise gaining his presence on the train by fraud or deceit, or through collusion or connivance with mere train crews. The test is: Did the person desiring passage in good faith offer himself for the purpose of being carried as a passenger, and was he as such accepted and received by the carrier and undertaken to be transported by it? If so, then the relation of carrier and passenger

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arises, and the law casts the duty on the carrier to convey him safely, and to exercise toward him "the diligence, prudence, and skill of a good carrier in that particular kind of transport," regardless or independent of any contract existing between them. Now, while it was alleged in the answer that the deceased wrongfully and fraudulently, and with the intent, and for the purpose, of deceiving the appellant, and without its knowledge or consent, and against its will, entered and remained in the mail car, there is no evidence justifying a finding of any such facts. Upon the record the case is reduced to the simple condition where the deceased, with the full knowledge and consent of the appellant, was permitted to travel in the mail car on the commission issued to and held by him. The commission was "the evidence of his right of transportation." Upon that the deceased offered himself to be carried, and upon that the appellant accepted and received, and undertook to transport him. There are, therefore, no facts nor inferences to support these averments contained in the answer, and to justify the submission of the case to the jury on such issues. Upon the whole record, we are persuaded that on the question of appellant's liability the respondents were entitled to recover as matter of law, and hence the errors referred to on the former hearing were nonprejudicial to the appellant. *Madsen v. Utah Light & Ry. Co. (Utah)* 105 Pac. 799.

Our former ruling reversing the judgment of the court below, and remanding the case for a new trial, is therefore set aside, and the judgment of the court below is now affirmed, with costs to respondents. It is so ordered.

FRICK and McCARTY, JJ., concur.

CHICAGO, R. I. & P. RY. CO. *v.* THURLOW.

(Circuit Court of Appeals, Eighth Circuit, April 27, 1910.)

[178 Fed. Rep. 894.]

Carriers—Carriers of Passengers—Creation of Relation.—The relation of carrier and passenger is created only by contract, express or implied, and the presumption is that one riding out of the place provided by a railroad company for passengers is not a passenger, or, if such, that he has assumed the increased risk from riding there.

Carriers—Carriers of Passengers—Termination of Relation.*—The relation of carrier and passenger between a railroad company and one riding on one of its trains terminates when the passenger has reached the place of his destination and has had reasonable time to alight and leave the company's premises.

Carriers—Railroads—Carriers of Passengers—Termination of Relation—Subsequent Injury to Passenger.—Plaintiff's husband shipped an emigrant car over defendant's railroad, containing household and other goods and horses. The contract provided that he should be transported on the same train for the purpose of caring for the stock and should ride in the caboose. The car reached its destination in the evening and was placed on a passing track. Deceased paid the freight and unloaded his horses into the stockyards, and cared for them for the night, after which he went into the car to sleep without the knowledge of defendant's employees. During the night in some unknown way the car was started, and ran down a grade and upon the main track, where it came into collision with a train, and he was killed. There was a hotel near by, and the car had a padlock with which it could be securely fastened. Held, that he was not a passenger after his horses were unloaded, conceding him to have been one previously, nor had he any right under his contract to occupy the car as a sleeping place, or to enter it except to unload his goods, and that as a trespasser defendant owed him no duty, except not to wantonly injure him, and could not be held liable for his death on the ground of negligence, because a derailing device at the switch, which should have derailed the car and prevented it from going onto the main track, was not in position or failed to operate.

In Error to the Circuit Court of the United States for the District of Kansas.

Action by Iola Thurlow against the Chicago, Rock Island & Pacific Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

*See first foot-note of *Powers v. Connecticut Co.* (Conn.), 34 R. R. 434, 57 Am. & Eng. R. Cas., N. S., 434.

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Paul E. Walker (*M. A. Low*, on the brief), for plaintiff in error.

W. P. Hackney (*J. T. Lafferty*, on the brief), for defendant in error.

Before SANBORN, Circuit Judge, and RINER and WM. H. MUNGER, District Judges.

RINER, District Judge. This was an action brought by the defendant in error, hereafter called the plaintiff, against the plaintiff in error, hereafter called the defendant, to recover damages for the death of her husband, which she alleges in her petition was caused by the negligence of the defendant. The record discloses the following facts:

On February 28, 1908, W. C. Thurlow, the husband of the plaintiff, loaded a car at Oxford, Kan., with household goods, farming implements, wearing apparel, bedding, four horses, and a wagon, for the purpose of shipping them to Calhan, Colo., near which place he had taken up a homestead. The car was hauled from Oxford to Wellington, Kan., by the Atchison, Topeka & Santa Fé Railway Company, and there delivered to the defendant for transportation to Calhan.

The defendant had two rates in force between Wellington and Calhan for shipments of this character. When the higher of the two rates was paid the railway company took full charge of the car and became responsible for its safe and prompt delivery. The lesser of the two rates limited the liability of the defendant, and if accepted by the shipper he was required to sign a contract whereby he was permitted to ride in the caboose attached to the train in which his car was being transported for the purpose of caring for his stock. By the contract he also released the defendant from the duty of caring for the stock and from liability for damages or injury resulting from certain causes therein specified, unless shown to be directly caused by the negligence of the defendant. The contract also contained a release, which the shipper, if he desired to accompany his stock, was required to sign, exempting the defendant from liability for injury to himself while he was accompanying the shipment. These two rates were shown in the tariffs filed with the Interstate Commerce Commission and were open to inspection by the public at the station at Wellington.

It was entirely optional with Thurlow as to which rate he would accept. He chose the lower of the two rates, signed the contract and release, and rode from Wellington, Kan., to Calhan, Colo., on the same train in which his car was transported. The train of which Thurlow's car was a part reached Calhan on the evening of March 3d about 7 o'clock, and his car was placed on what is designated in the record as the "passing track," where the unloading chute for the purpose of unloading live

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stock was located. After this was done he paid the freight to the agent at Calhan and the car was delivered into his possession. Later in the evening another emigrant car was placed on the passing track, the two were coupled together, and Thurlow's car was placed opposite the unloading chute. Assisted by Munyan, the man in charge of the other car, Thurlow's horses were unloaded and placed in the stockyards and cared for for the night. After that had been done, Munyan and Thurlow released the brakes on Thurlow's car, ran it down the track for a distance of about 200 feet from the unloading chute to a highway crossing, where Thurlow stopped it by setting the brakes. Thereafter, and about 10 o'clock, the night operator, at Munyan's request, assisted in releasing the brakes on Munyan's car and pushing the car to the chute, where his live stock was also unloaded.

After the horses had been unloaded, Munyan and Thurlow built a fire, and prepared and ate their supper. About 12:30 on the morning of the 4th Thurlow went to his car for the purpose of going to bed. Munyan requested Thurlow to go with him to the hotel, where he (Munyan) offered to procure rooms for them. Thurlow refused to do so, although the door of his car was protected by a padlock. The fact that Thurlow intended to, or did, sleep in his car was not known to the agent or any person connected with the defendant. In some manner during the night, though for what reason or how the record does not disclose, Thurlow's car escaped and ran out on the main line, where it collided with a train and Thurlow was killed.

The petition charges that the defendant was negligent in failing to set the brakes on the car when it was left at Calhan, and failing to place the derail provided for that purpose, so that the car could not escape onto the main line, and in failing to capture the car after it had escaped from the passing track and before it collided with the train. The passing tract at Calhan, from near the point where Thurlow's car was located, descends rapidly towards the east, and a derail switch was installed for the purpose of protecting trains on the main line, and was so located that, if a car got beyond control while on the passing track, the derail, if in position, would wreck it and turn it down an embankment. The derail switch consisted of a movable bar, which was laid on the top of the rail and placed in position to derail cars. The bar was fastened by means of hinges to three pedestals, which were spiked to the ties between the rails.

At the trial of the case the court withdrew from the consideration of the jury all allegations of negligence, except the allegation respecting the position of the derail switch. The evidence tended to show that when the section crew quit work on the evening of March 3d the derail was in proper condition in every

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respect, and that when it was last used by any one connected with the defendant it was placed in position so that it would derail cars. Upon examination the morning following the accident it was found that the derail had been turned over and laid between the rails in such a position that the passing track could be used without hindrance. The west pedestal of the derail switch had been broken; but the evidence shows that, notwithstanding that fact, it could be used. The only evidence offered by the plaintiff in respect to the derail switch was a telegram sent by Dickey, the conductor of the train which brought the Munyan car to Calhan, which read as follows:

"Calhan, 3-3, 2-97. Run over derail east end Calhan passing track. Derail is broken, but can be used. Dickey."

The brakeman, one of the members of the crew of this train, testified that after his train left the passing track at Calhan he placed the derail in proper position to derail any car that might become unmanageable. The night operator testified that he cautioned both Munyan and Thurlow to be very careful with their cars while on the passing track, and called their especial attention to the heavy grade and the danger of attempting to move the cars. At the conclusion of the evidence the defendant requested the court to direct a verdict in its favor, which request was overruled, and an exception taken.

The court by its instructions took away from the jury the question whether the deceased was a licensee, on the ground that there was no evidence in the case which tended to show that he was such licensee, or on which recovery could be had if he was a licensee, but instructed that if the jury believed the deceased did not intend to terminate his relation of passenger with the defendant, and defendant did nothing to terminate the contract, and if a reasonably prudent man would have remained in the car during the night, a recovery might be had, unless the deceased did some act which contributed to his death.

The petition did not allege that at the time of the accident the deceased was a passenger. The allegation is that pursuant to a custom and verbal agreement with the defendant the defendant allowed the deceased "to ride in and live in such cars with such property, and look after and care for the same, until such cars arrived at their destination and were emptied of their freight at the terminal of such car's destination, which the said W. C. Thurlow did;" and after alleging the arrival of the car at its destination, and that deceased had unloaded his horses, it is further allaged:

"And in pursuance of said verbal agreement, and according to defendant's said custom of allowing caretakers in charge of such cars, therefore and then in evidence, and customary as aforesaid, the said W. C. Thurlow remained in said car, intending to stay in said car and care for said property until the

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same should be placed on the said defendant's side track adjoining its depot the next day."

There was no evidence tending to show a verbal agreement or custom permitting the deceased to remain in the car during its transportation, or after it had reached its destination. No attempt was made to prove a verbal agreement, and the only evidence of a custom was to the effect that prior to that time some of the persons in charge of emigrant cars remained in them overnight. There was no evidence tending to show that they did so with the permission of the defendant, or that it ever at any time recognized in any way their right to do so.

It is well settled by repeated decisions that a person must be expressly or impliedly received as a passenger before a carrier becomes under obligation to exercise towards such person that high degree of care and caution for his safety which is due from a carrier to a passenger. The relation between carrier and passenger is contractual, and is created only by a contract express or implied. In *Chicago, Rock Island & Pacific Railway Company v. Lee*, 92 Fed. 318, 34 C. C. A. 365, Judge Sanborn said:

"The presumption, in the absence of countervailing evidence, is that one who rides in a baggage car, an express car, a stock car, or on a freight train, is not a passenger on it, and, even if he is, since he is riding out of the place provided by the company for passengers, that he has assumed the increased risk resulting from riding there, and is therefore guilty of contributory negligence. *Bryant v. Railway Company*, 53 Fed. 997 [4 C. C. A. 146]; *Player v. Railway Company*, 62 Iowa, 727 [16 N. W. 347]; *Jenkins v. Railway Company*, 41 Wis. 112; *Railway Company v. Miles*, 40 Ark. 298 [48 Am. Rep. 10]; *Gardner v. Northampton Company*, 51 Conn. 143 [50 Am. Rep. 12]; *Powers v. Railroad Company*, 153 Mass. 188 [26 N. E. 446]; *Files v. Railroad Company*, 149 Mass. 204 [21 N. E. 311, 14 Am. St. Rep. 411]; *Hoar v. Railroad Company*, 70 Me. 65 [35 Am. Rep. 299]."

Although it is not alleged in the petition that the deceased was a passenger, yet the case was tried by the plaintiff on the theory that he was a passenger, and that at the time of the accident the relation of carrier and passenger had not been terminated. Assuming, for the purposes of the case, that the relation of passenger and carrier did exist by virtue of the contract entered into between the deceased and the defendant for his transportation from Wellington to Calhan, and that the defendant had undertaken, as to him, all the duties and obligations of a carrier of passengers, manifestly that relation terminated upon his arrival with his car at his destination and after a reasonable time had elapsed for him to alight and leave the premises of the defendant. *Chicago, Rock Island & Pacific Railway Company v. Wood*, 104 Fed. 663, 44 C. C. A. 118; *Archer v. Union Pacific Rail-*

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way Company, 110 Mo. App. 349, 85 S. W. 934; Chicago & Eastern Illinois Railroad Company v. Jennings, 190 Ill. 478, 60 N. E. 818, 54 L. R. A. 827; Allerton v. Boston & Maine Railroad Company, 34 Am. & Eng. R. Cases, 563; Legge v. New York, N. H. & H. R. Co., 197 Mass. 88, 83 N. E. 367, 23 L. R. A. (N. S.) 633; Bowen v. Illinois Central Railroad Company, 136 Fed. 306, 69 C. C. A. 444, 70 L. R. A. 915; Chicago, K. & W. R. Co. v. Frazer, 55 Kan. 586, 40 Pac. 923; Payne v. Illinois Central Railroad Company, 155 Fed. 73, 83 C. C. A. 589; Orcutt v. Northern Pacific Railroad Company, 45 Minn. 368, 47 N. W. 1068.

This was certainly true after his horses had been removed from the car and placed in the stockyards for the night. His contract provided for his transportation upon the train for the sole purpose of caring for the live stock, and after the train reached its destination and the live stock had been unloaded, his car being provided with a padlock whereby it could be securely locked, there was no occasion for him to return to the car. The car had been safely transported to its destination, he had paid the freight, and his live stock had been unloaded and placed in the stockyards. After that time he stood in no closer relation to the defendant than an ordinary consignee, who has a car load of freight on a side track at a station. He would have the right to go into the car for the purpose of unloading his freight, and while there for that purpose the defendant would owe him the duty of using reasonable care to see that he was not injured by its negligence or the negligence of its employees. The contract provided that he should remain seated in the caboose attached to the train while the train was in motion, and that he was permitted to go on the train and in his car only for the purpose of caring for the live stock. The removal of the stock from the car took from the deceased his right to protection while in the car, at least until he commenced to remove his freight.

There is no evidence tending to show that he used this car as a place to sleep, or that he rode therein, during the transportation of the car from Wellington to Calhan. The contract provided that he should ride in the caboose, and the only authority he had for being upon the car at any time was for the purpose of taking care of the live stock. It is not claimed that there was any omission of duty towards the deceased until after he reached his destination, and even if it be conceded that the relation of passenger and carrier continued up to the time his horses were unloaded in the stockyards and cared for for the night, which was between 9 and 10 o'clock, it certainly terminated after that had been done and a reasonable time had elapsed to enable him to leave the defendant's premises. That he had sufficient time to do so is clearly established by the record. The testimony

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shows that he did not attempt to go to bed on the car until half past 12 on the morning of the 4th; that when he did go into his car to sleep he did so without the knowledge or consent of the defendant or its employees; and in the absence of such knowledge it was but reasonable for the defendant's employees to suppose, after the stock had been cared for, there being a hotel within 300 feet of the station, that he would go to the hotel for the night.

If he remained upon the car without the knowledge of the defendant or its employees, we cannot understand upon what theory it can be held guilty of negligence. If he was a mere trespasser, as we think he was, the defendant owed him no duty except that it should not through wanton or willful negligence injure him, and such negligence cannot be attributed to the defendant unless it or some of its employees knew of his presence upon the car. As we have already suggested, there was no occasion for him to be in or about the car after his horses had been unloaded and cared for for the night. He had been provided with a padlock, and his car could have been securely locked, and his goods fully protected without his presence in the car; nor does his contract of shipment presuppose a necessity for doing so, and therefore confer upon him a corresponding right.

The court instructed the jury as follows:

"Now, gentlemen, if the plaintiff in this case has proven to you by the greater weight of all the credible testimony in the case that after this train arrived at the town of Calhan, taking into consideration the time at which the car arrived there, the time in which it would take a reasonably prudent person to care for the stock in his car, which he was obliged to care for under the contract, properly, and taking all the facts and circumstances in evidence in the case, if you believe the deceased did not intend to terminate his relation of passenger with the defendant company, and defendant did nothing to terminate the contract, and that on account of the manner in which the car was there left, and the obligation imposed upon the deceased to look after and care for his live stock, if a reasonably prudent man would have there remained all the night, as he did, then in that case the relation of the deceased to the railway company as passenger had not been terminated either by himself or defendant. The plaintiff may, if the relation of passenger continued at the time of the accident, recover in this action, unless he did some act that contributed to his death.

"There is evidence here that he, with others, moved this car, that the brakes were unset, and that the brakes were again set. If in any act he did there, unloosening these brakes or in resetting them—not setting them tight, as they should have been—if anything he did there on that night directly contributed toward that car escaping down that track, and colliding with the west-

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bound train, which resulted in his death, then you cannot find for the plaintiff in this case. And you cannot find for the plaintiff in this case unless you find at the time that this car escaped he occupied the relation of passenger to the railway company. If the railway company carried deceased to the town of Calhan, and the deceased then intended to abandon his relation with the company, the plaintiff cannot recover in this suit. If, under all the facts and circumstances, taking into consideration the time of arriving there, the place at which the car was left, as to whether it was day or night—taking into consideration all the facts and circumstances in the case, if the deceased did not have a reasonable time after arriving there to leave the train and premises of defendant, and thus sever his relation as passenger with the company, then plaintiff may recover in this action for such injury and damages as she has sustained by reason of his death.”

This instruction made the right to recover depend upon whether the relation of passenger and carrier existed at the time of the accident, leaving the question to the jury to be determined as a question of fact. We think, under the plaintiff's evidence, if it stood alone, that the court should have declared as a matter of law that the relation of carrier and passenger had ceased, and that the defendant's request for an instructed verdict in its favor should have been sustained.

In the view we have taken of this case, it becomes unnecessary to discuss other questions urged at the argument and in the briefs of counsel.

The judgment of the Circuit Court must be reversed, with instructions to grant a new trial.

MCDADE *v.* NORFOLK & W. RY. CO.

(Supreme Court of Appeals of West Virginia, June 11, 1910.)

[68 S. E. Rep. 378.]

Carriers—Relation Between Passenger and Carrier.*—The relation of carrier and passenger does not terminate merely by the act of the passenger in alighting from the car at his destination. It continues until a reasonable time for the passenger to leave the railway premises has elapsed.

Carriers—Assault on Passengers—Justification.†—Provocation by insulting words alone does not justify an assault upon a passenger by the conductor.

Carriers—Assault on Passenger—Exemplary Damages.‡—Exemplary damages are allowable in an action against a railway company for willful injury inflicted by the conductor upon a passenger without lawful justification.

(Syllabus by the Court.)

Error to Circuit Court, McDowell County.

Action by Allen P. McDade against the Norfolk & Western Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Wyndham Stokes and *Graham Sale*, for plaintiff in error.

Strother, Taylor & Flanagan, for defendant in error.

ROBINSON, P. McDade purchased a ticket at Bluefield which, according to his testimony, entitled him to transportation by the Norfolk and Western Railway Company from that place to Coaldale. The conductor says the ticket was one for Cooper. The train on which he took passage was not scheduled to stop at Coaldale. He was told by the conductor that for Coaldale he would have to get off at Elkhorn. That place was beyond Coaldale. The conductor collected fare for the additional distance. McDade says two additional fares were collected from him during the trip. After the train passed Coaldale and before it reached Elkhorn a stop was made because of an obstruction on the track. McDade naturally took advantage of the opportunity to leave the train there and save distance in returning to Coaldale. He alighted from the car and requested the conductor to return him the extra fare that he had paid. There are dif-

*See first foot-note of *Powers v. Connecticut Co.* (Conn.), 34 R. R. 434, 57 Am. & Eng. R. Cas., N. S., 434.

†See extensive note, 22 R. R. R. 924.

‡See foot-note of *St. Louis, etc., R. Co. v. Garner* (Miss.), 35 R. R. 185, 58 Am. & Eng. R. Cas., N. S., 185; foot-note of *Amann v. Chicago Consol. Traction Co.* (Ill.), 35 R. R. R. 141, 58 Am. & Eng. R. Cas., N. S., 141.

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ferent stories in relation to the words that were spoken between McDade and the conductor at the time McDade was leaving the train. The conductor says that McDade called him a most insulting and provoking name after he alighted from the car. It is clear from the evidence—in fact it is conceded—that the only provocation that McDade gave the conductor, if any, was by the use of insulting words. While McDade was still near the train, on the premises of the railway, the conductor violently assaulted him and did him bodily injury. A jury found damages in favor of McDade against the railway company in the sum of \$400. From a judgment upon the verdict, the railway company has prosecuted the writ of error now before us.

McDade was still a passenger at the time he was assaulted if reasonable time in which to leave the premises of the railway company had not elapsed. Baldwin on American Railroad Law, 327; 4 Elliott on Railroads, § 1592; 2 Hutchinson on Carriers, § 1016; Moore on Carriers, 556. Whether such reasonable time had elapsed before the assault was a question for the jury which they have determined in the negative. An instruction properly submitted this question to them. The jury found from the facts and circumstances that the relation of carrier and passenger had not terminated. There is little conflict of evidence on this feature of the case, and that finding is undoubtedly warranted.

Since McDade had not ceased to be a passenger, the railway company was under an absolute contractual duty to protect him from wilful and unlawful injury at the hands of its servants. The railway company still owed him that duty at the time the injury was done to him. Insulting language alone did not justify the assault. The conductor made the carrier liable when he injured the passenger because of mere words spoken. "For wilful injury, inflicted upon a passenger of a common carrier by a servant of the latter, under provocation, by the exercise of force or violence, not justified under the principles of the law of self-defense, the carrier is liable." *Teel v. Coal & Coke Railway Co.*, 66 S. E. 470.

The point is made that the damages found are excessive. The amount is indeed beyond the compensatory damages proved. But exemplary damages were allowable in this case. The assault was a breach by the carrier, through its conductor, of the duty which it owed to persons intrusting themselves to its care, at its solicitation and for compensation. *Claiborne v. Railway Company*, 46 W. Va. 363, 33 S. E. 262. The jury were told that they might mitigate the damages if they believed the provocation by the passenger's language warranted their doing so. There is conflict of oral evidence in reference to the use of insulting words. The jury saw the witnesses and were the judges as to the credibility of those witnesses. They were also the judges of the facts and circumstances given in evidence. The question

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of wantonness and wilfulness was within their province. There is no rule by which the amount of damages found can be said to be excessive.

The verdict is not contrary to the evidence. The trial court rightly applied the law to the case. There is no error in the judgment. It will be affirmed.

FLORIDA RY. CO. v. DORSEY.

(Supreme Court of Florida, June 11, 1910.)

[52 So. Rep. 963.]

Action—Joinder—Single Cause of Action.—In an action by a passenger against a railroad company, allegations that the defendant in operating and running its trains did not stop long enough to allow the plaintiff a reasonable time to alight from the car, but carelessly and negligently started said train, and carelessly put said train in violent quick motion, which said careless and negligent act threw the plaintiff violently to the ground by means of which she was injured in a specified way, states a single cause of action.

Appeal and Error—Review—Harmless Error—Striking Out Pleas.—Where testimony covered by special pleas is admitted under a plea of general issue, the action of the court in striking the special pleas need not be reviewed, since no harm could have resulted from striking the special pleas.

Negligence—Contributory Negligence—Effect.*—In an action to recover damages for a mere negligent injury, not charged to have been willfully, wantonly, or maliciously done, where the injury would not have occurred but for the negligence of the plaintiff, even though the defendant was negligent as alleged, the plaintiff, having proximately contributed to the efficient cause of his own injury, cannot in general recover damages under the common-law rule that where both parties are at fault the law will leave them to the consequences of their own wrong.

Negligence—"Contributory Negligence"—Proximate Cause—Willful or Wanton Negligence.—To constitute such "contributory negligence" as bars recovery, the plaintiff's negligence must have been a portion of the efficient proximate cause of the injury, and the defendant's negligence must not have been willful, wanton, or malicious. If the injury was caused solely by the plaintiff's negligence, of course the defendant is not liable.

Negligence—Contributory Negligence—Effect.*—Public policy requires that every one shall exercise reasonable care and diligence

*See first foot-note of *Evansville, etc., R. Co. v. Berndt (Ind.)*, 34 R. R. R. 535, 57 Am. & Eng. R. Cas., N. S., 535.

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for the protection of his own person and property, and, when his failure to do this concurs with the mere negligence of another and proximately causes the injury, there can be no recovery under the common-law rule.

Negligence—Contributory Negligence—Apportionment of Damages.—The common-law rule of nonliability of a merely negligent defendant, when the plaintiff is guilty of contributory negligence, has been modified by the statute allowing a recovery, but requiring the damages to be apportioned, where the plaintiff and the defendant are both negligent, and the injury to one not an employee is caused by the running of railroad trains or machinery, or by any person in the employment and service of a railroad company. Such enactments are within the legislative power where the limitations imposed by the Constitution are observed.

Carriers—Carriage of Passengers—Care Required of Carrier.†—The common-law rule of duty and liability sustained by public policy does not make a common carrier an absolute insurer of the safety of its passengers; but, for the purpose of stimulating efficiency in the carrier and of securing the safety and comfort of passengers in the interest of humanity and the general welfare, a common carrier is required to exercise the highest degree of care, foresight, prudence, and diligence reasonably demanded at any given time by the conditions and circumstances then affecting the passenger and the carrier. This rule is not abrogated by the statute regulating the liability of railroad companies in certain cases.

Carriers—Carriage of Passengers—Care Required of Carrier.—In an action for negligence, the question whether the railroad company has exercised all ordinary and reasonable care and diligence is to be determined by a consideration of the duty imposed by law upon the company under the facts and circumstances of each case that arises.

Negligence—Elements—Degree of Care Required—Circumstances of Parties.—The care and diligence that are exercised in a given case might be all that is ordinary and reasonable with reference to one duty imposed by law because of the relation and circumstances of the parties towards each other; but it may be regarded as not being ordinary or reasonable care and diligence or as being negligence with reference to another duty.

Carriers—Carriage of Passengers—Care Required of Carrier.‡—Where a person is entitled to passage on a train, he has a right to

†See second foot-note of *Christensen v. Oregon S. L. R. Co.* (Utah), 34 R. R. R. 253, 57 Am. & Eng. R. Cas., N. S., 253; last foot-note of *Irwin v. Louisville & N. R. Co.* (Ala.), 34 R. R. R. 11, 57 Am. & Eng. R. Cas., N. S., 11; *Colorado & S. R. Co. v. McGeorge* (Colo.), 33 R. R. R. 700, 56 Am. & Eng. R. Cas., N. S., 700.

‡See first foot-note of *Powers v. Connecticut Co.* (Conn.), 34 R. R. R. 434, 57 Am. & Eng. R. Cas., N. S., 434.

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the protection due a passenger until he has safely alighted by the proper egress.

Carriers—Carriage of Passengers—Sudden Jerks.§—The unnecessary sudden jerking of a train while a passenger is rightfully alighting is negligence.

Carriers—Injuries to Passengers—Contributory Negligence—Apportionment of Damages.—If a passenger improperly attempts to alight from a car that is in motion and is injured in doing so, such attempt may be the sole cause of the injury and may bar a recovery; but where a passenger is properly leaving a car at her destination, and as she is about to step to the ground from the usual egress the car is suddenly and violently jerked or moved, when the agents of the carrier should have known she was alighting, it is negligence, and, if injury to her results proximately therefrom, the plaintiff has a right of action under the statute, even though she is also negligent, the recovery being apportioned according to the relative negligence.

Carriers—Injuries to Passengers—Contributory Negligence—Leaving Conveyance.—Ordinary prudence requires that a passenger shall not alight from a moving car; but if the exit is properly begun while the car is stationary, and the car is suddenly started with undue violence before the passenger alights, the carrier may be negligent and the passenger free from negligence.

Trial—Instructions—Assumptions as to Facts.—A charge that the plaintiff sues the defendant "in an action on the case and claims * * * damages for the negligence of the defendant in the operation of its train, whereby the plaintiff was thrown from the steps of its passenger coach and injured, as set out in her declaration, which has been read in your hearing," is merely a statement of the complaint as made, and does not assume the negligence of the defendant and is not a charge upon the facts.

Carriers—Injuries to Passengers—Action—Instructions.—In an action by a passenger against a railroad company for negligently starting the train before the passenger could alight, a charge that if the jury find from the evidence that when the train stopped at her destination "the plaintiff in reasonable haste commensurate with her age and incumbrance of baggage directly proceeded to alight, * * * and that before she could clear herself from the steps of the train the train was started with such violent motion as to throw the plaintiff to the ground and injure her, then you should find for the plaintiff," is within the issues and is not erroneous because of the reference to the plaintiff's baggage.

§See first foot-note of *Boston Elev. Ry. Co. v. Smith* (C. C. A.), 32 R. R. R. 551, 55 Am. & Eng. R. Cas., N. S., 551; last foot-note of *Norfolk & W. Ry. Co. v. Rhodes* (Va.), 31 R. R. R. 417, 54 Am. & Eng. R. Cas., N. S., 417.

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Carriers—Injuries to Passengers—Setting Down Passengers.—A charge that it is the duty of a railroad company “to give a reasonably sufficient time at its stopping places for its passengers to safely alight from their trains” is not error. It is not a too high degree of duty and is within the issues.

Carriers—Injuries to Passengers—Action—Instructions.—To charge the jury “that a railroad company cannot promulgate an arbitrary rule for the conduct of their passengers as will exempt them from liability inflicted by their sole negligence” is not error, particularly when the remainder of the charge makes the whole more clear and entirely fair to the carrier; the promulgation of a rule being testified to.

Trial—Instructions—Form—Language of Statute.—It is not error for the court to charge the language of a statute applicable to the case.

Carriers—Injuries to Passengers—Action—Instructions.—There is no error in the charge that after reasonable alighting time for passengers has elapsed the conductor of a train should then avoid all injury to a passenger that he “possibly can when he knows or sees that she is about to suffer some damage.”

Carriers—Injuries to Passengers—Action—Instructions.—The evidence as to the length of time the train remains stationary being without conflict, a charge “that the time required for a passenger to leave a train depends upon the circumstances of each particular case; whether the stop on the day of this accident was reasonably sufficient under the circumstances in evidence is a question for you to determine”—is not erroneous.

Carriers—Injuries to Passengers—Action—Question for Jury.—Where the facts are not conceded, and the testimony as to them is conflicting, the reasonableness of the time allowed for passengers to alight from a railroad train is not a question of law.

Trial—Instructions—Requests Partly Erroneous.—It is not error to refuse to give a charge that is not entirely correct, particularly when the substance of the requested charge is given in another instruction.

Judgment—Entry—Time for Entry.—The circuit court has authority to have a judgment entered in vacation after the disposition of a motion for a new trial properly made in the case and continued in term time.

Appeal and Error—Review—Error Not Shown.—Where no errors of law appear, and there is testimony to support the verdict, and it does not appear that the jury were not governed by the evidence in their finding, the judgment will be affirmed.

(Syllabus by the Court.)

||See first foot-note of *Chicago, etc., R. Co. v. Lampman* (Wyo.), 34 R. R. R. 28, 57 Am. & Eng. R. Cas., N. S., 28.

Florida Ry. Co. v. Dorsey

In Banc. Error to Circuit Court, Taylor County; B. H. Palmer, Judge.

Action by M. S. Dorsey against the Florida Railway Company. From a judgment in favor of plaintiff, defendant brings error. Affirmed.

W. B. Davis and *Carter & McCollum*, for plaintiff in error.
Gornto & Battle, for defendant in error.

WHITFIELD, C. J. Mrs. M. S. Dorsey, a widow, brought an action to recover damages for personal injuries while a passenger of the railway company. The negligence alleged is that the defendant in operating and running its train did not stop it long enough to allow the plaintiff a reasonable time to alight from the car, but "carelessly and negligently started said train. * * * and carelessly and negligently put said train in violent quick motion, which said careless and negligent act * * * threw the said plaintiff violently to the ground, by means of which" she was injured. The declaration was demurred to on the grounds that it is not the carrier's legal duty to see that a particular passenger safely leaves the train; that the carrier's only duty is to allow the passengers in general a reasonable time to alight unless the passenger is decrepit and the carrier knows of it; that it is not shown that passengers did not have a reasonable time to alight at the time of the injury, or that plaintiff was decrepit and defendant knew of it; that the allegations are indefinite as to whether the alleged injury was caused by the failure to give time for alighting or by the sudden and violent moving of the train. This demurrer was overruled. Judgment was recovered by the plaintiff, and the railroad company took writ of error.

(O)verruling the demurrer was not error. Whatever may be the exact legal duty of the carrier to its passengers while alighting from a car, the allegations of the declaration above quoted show actionable negligence, and the allegations are not double or indefinite. They state a particular single right of action.

The court struck several special pleas, but as the defendant was allowed to introduce evidence under the general issue matters contemplated by the special pleas, and as the court charged fully upon the subjects, it is not necessary to consider in detail the assignments of error predicated on the striking of the special pleas.

In an action to recover damages for a mere negligent injury, not charged to have been willfully, wantonly, or maliciously done, where the injury would not have occurred but for the negligence of the plaintiff, even though the defendant was negligent as alleged, the plaintiff, having proximately contributed to the efficient cause of his own injury, cannot in general recover damages under the common-law rule that where both

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parties are at fault the law will leave them to the consequences of their own wrong.

To constitute such contributory negligence as bars recovery, the plaintiff's negligence must have been a portion of the efficient proximate cause of the injury, and the defendant's negligence must not have been willful, wanton, or malicious. If the injury was caused solely by the plaintiff's negligence, of course the defendant is not liable. Public policy requires that every one shall exercise reasonable care and diligence for the protection of his own person and property; and, when his failure to do this concurs with the mere negligence of another and proximately causes injury, there can be no recovery under the common-law rule. This rule operates harshly in cases where persons have to deal with dangerous agencies which they are generally not familiar with or accustomed to, and statutes have been enacted to modify the strict common-law rule in certain classes of cases where the parties are not on equal footing.

The common-law rule of nonliability of a merely negligent defendant, when the plaintiff is guilty of contributory negligence, has been modified by the statute allowing a recovery, but requiring the damages to be apportioned, where the plaintiff and the defendant are both negligent, and the injury to one not an employee is caused by the running of railroad trains or machinery, or by any person in the employment and service of a railroad company. Such enactments are within the legislative power where the limitations imposed by the Constitution are observed. *Florida East Coast R. Co. v. Lassiter*, 58 Fla. 234, 50 South. 428; *Stearns & Culver Lumber Co. v. Fowler*, 58 Fla. 362, 50 South. 680; *Atlantic Coast Line Ry. v. McCormick* (decided at this term) 52 South. 712.

The common-law rule of duty and liability sustained by public policy does not make a common carrier an absolute insurer of the safety of its passengers; but, for the purpose of stimulating efficiency in the carrier and of securing the safety and comfort of passengers in the interest of humanity and the general welfare, a common carrier is required to exercise the highest degree of care, foresight, prudence, and diligence reasonably demanded at any given time by the conditions and circumstances then affecting the passenger and the carrier. This rule is not abrogated by the statute referred to above. See *Morris v. Florida Cent. & P. R. Co.*, 43 Fla. 10, 29 South. 541.

Whether the railroad company has exercised all ordinary and reasonable care and diligence is to be determined by a consideration of the duty imposed by law upon the company under the facts and circumstances of each case that arises. *Seaboard Air Line R. Co. v. Scarbrough*, 52 Fla. 425, 42 South. 706.

The care and diligence that are exercised in a given case might be all that is ordinary and reasonable with reference to

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one duty imposed by law because of the relation and circumstances of the parties towards each other; but it may be regarded as not being ordinary or reasonable care and diligence, or as being negligence, with reference to another duty.

Where a person is entitled to passage on a train, he has a right to the protection due a passenger until he has safely alighted by the proper egress. Moore on Carriers, 554, and authorities cited.

The duty of the carrier to safely deliver a passenger at his desired destination involves the duty of observing whether he has actually alighted before the car is again started. If the agent of the carrier fails in this duty and does not give the passenger a reasonably sufficient time to get off before the car is started again, it is negligence; and, if injury proximately results therefrom, the carrier is liable in damages. The duty is due the passenger not only because of danger of injury, but also because the carrier has engaged to carry to destination and to safely deliver the passenger. The carrier, having received the fares, knows what passengers intend to leave the cars at any station, and before starting the cars again the agents of the carrier should see that all who are leaving the cars have safely lighted. The unnecessary sudden jerking of a train while a passenger is rightfully alighting is negligence.

If a passenger improperly attempts to alight from a car that is in motion and is injured in doing so, such attempt may be the sole cause of the injury and may bar a recovery; but where a passenger is properly leaving a car at her destination and as she is about to step to the ground from the usual egress the car is suddenly and violently jerked or moved, when the agents of the carrier should have known she was alighting, it is negligence; and, if injury to her results proximately therefrom, the plaintiff has a right of action under the statute, even though she is also negligent, the recovery being apportioned according to the relative negligence.

Ordinary prudence requires that a passenger shall not alight from a moving car; but, if the exit is properly begun while the car is stationary, and the car is suddenly started with undue violence before the passenger alights, the carrier may be negligent and the passenger free from negligence.

These observations will render unnecessary a detailed discussion of many assignments of error predicated upon charges given and refused.

A charge that the plaintiff sues the defendant "in an action on the case and claims * * * damages for the negligence of the defendant in the operation of its train, whereby the plaintiff was thrown from the steps of its passenger coach and injured as set out in her declaration, which has been read in your hearing," is merely a statement of the complaint as made, and

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does not assume the negligence of the defendant, and is not a charge upon the facts.

A charge that if the jury find from the evidence that, when the train stopped at her destination, "the plaintiff in reasonable haste commensurate with her age and incumbrance of baggage directly proceeded to alight, * * * and that, before she could clear herself from the steps of the train, the train was started with such violent motion as to throw the plaintiff to the ground and injure her, then you should find for the plaintiff," is within the issues and is not erroneous because of the reference to the plaintiff's baggage. By custom and usage passengers are allowed to have baggage with them when others are not inconvenienced thereby. The plaintiff testified that she had "some parcels and a grip" in her hands as she was leaving the car. Defendant's agents should have known of the baggage the passenger had with her, and her effort to leave the car with her baggage is one of the circumstances to be considered in determining the question of negligence. The negligence alleged is the sudden and violent movement of the car before the plaintiff had time to reach the ground from the steps of the cars, and the charge was within the issue made by the plea of not guilty.

A charge that it is the duty of a railroad company "to give a reasonably sufficient time at its stopping places for its passengers to safely alight from their trains" is not error. It is not a too high degree of duty and is within the issues.

To charge the jury "that a railroad company cannot promulgate an arbitrary rule for the conduct of their passengers as will exempt them from liability inflicted by their sole negligence" is not error, particularly when the remainder of the charge makes the whole more clear and entirely fair to the carrier; the promulgation of a rule being testified to. *Louisville & Nashville R. Co. v. Berry*, 58 Fla. —, 50 South. 579. It is not error for the court to charge the language of a statute applicable to the case. Section 3148 of the General Statutes of 1906 is applicable to this case and may be given in full in a charge to the jury; the last provision in it, that "the presumption in all cases being against the company," having reference only to the burden of proof cast by the statute in the particular case. *Atlantic Coast Line R. Co. v. Crosby*, 53 Fla. 400, 43 South. 318.

There is no error in the charge that after reasonable alighting time for passengers has elapsed the conductor of a train should then avoid all injury to a passenger that he "possibly can when he knows or sees that she is about to suffer some damage." The conductor testified that, when he thought all passengers were out, he signaled the train to start. It started off slowly, and he then saw the lady coming down the steps and called to her to "wait a minute and I will stop the train for you." It was for the jury to determine whether the carrier had discharged its duty

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under the circumstances. A very high degree of care was required of the carrier under the circumstances stated in the evidence.

The evidence as to the length of time the train remained stationary is not without conflict, and a charge: "That the time required for a passenger to leave a train depends upon the circumstances of each particular case. Whether the stop on the day of this accident was reasonably sufficient under the circumstances in evidence is a question for you to determine"—is not erroneous.

As the facts were not conceded, and the testimony as to them was conflicting, the reasonableness of the time allowed for passengers to alight was not a question of law in this case.

A charge requested by the defendant as to the duty of the conductor to assist passengers to alight was incorrect, as it referred to the courtesy shown "female passengers in some instances," and the substance of the charge was properly given by the court in its general charge.

Further discussion of the charges seems to be unnecessary. No fatal error appears in the action of the court thereon. The verdict has testimony to support it, and it does not appear that the jury were not governed by the evidence in their finding.

The court had authority to have the judgment entered in vacation after the disposition of the motion for new trial properly made and continued during a term. See *McGee v. Ancrum*, 33 Fla. 499, 15 South. 231.

The judgment is affirmed.

TAYLOR, SHACKLEFORD, HOCKER, and PARKHILL, JJ., concur.

COCKRELL, J., absent, concurred in opinion as prepared.

ST. LOUIS & S. F. R. Co. v. Cox.

(Supreme Court of Oklahoma. May 10, 1910.)

[109 Pac. Rep. 511.]

Continuance—Appeal and Error—Review—Refusal of Continuance.
—The granting or refusing to grant a continuance of a cause rests largely in the sound judicial discretion of the trial court, and, in the absence of abuse of such discretion, the ruling of the trial court will not be disturbed here.

Continuance—Absent Witness—Application.—Where the continuance of the cause is sought on the ground of an absent witness, the party applying therefor must, among other things, make it clearly appear in the application therefor where said witness resides, if he knows, the probability of procuring his testimony within a reasonable time, and that the facts affiant believes said witness will prove are by affiant believed to be true. Where said application fails to so state, it is not error to refuse to grant a continuance.

Carriers—Injuries to Passenger.*—A railroad company is liable to a passenger on a freight train for injuries inflicted upon him by violently and without warning jerking the train after it had slowed up and stopped at the station platform at the end of the journey, and after he, by direction of the conductor, has arisen from his seat in the car to alight.

(Syllabus by the Court.)

Error from District Court, Bryan County; D. A. Richardson, Judge.

Action by J. B. Cox against the St. Louis & San Francisco Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Flynn & Ames, for plaintiff in error.

C. C. Hatchett and *A. H. Ferguson*, for defendant in error.

TURNER, J. On October 19, 1907, J. B. Cox, defendant in error, sued the St. Louis & San Francisco Railroad Company, plaintiff in error, in the United States Court for the Indian Territory, Central District, at Durant, in damages for personal injuries. The complaint substantially states that theretofore, on August 17, 1907, plaintiff paid the conductor of one of defendant's freight trains the sum of 25 cents, which entitled him to be and he was transferred as a passenger on said train from Durant to Mead, I. T.; that, when the train reached Mead, it stopped for the purpose of allowing passengers to alight therefrom; that thereupon plaintiff arose from his seat, and, while walking to the door for the purpose of alighting from the ca-

*See fourth foot-note of preceding case.

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boose in which he rode, defendant, through its servants then and there propelling, operating, and managing said train, caused the same to be negligently moved forward and suddenly stopped with such force and violence as to cause him to fall, to his injury \$2,000, for which he prayed judgment. After answer, in effect a general denial and a plea of contributory negligence, and reply filed, the trial being set for March 26th, defendant, on March 29th, on the calling of the cause, filed an application for continuance, which the court overruled and the cause was tried to a jury, which resulted in judgment for plaintiff. After motion for a new trial filed and overruled, defendant brings the case here, and assigns that the court erred in overruling said motion for continuance. The motion substantially states that defendant cannot go safely to trial on account of the absence of witnesses Burge and Bolts, the brakeman and conductor of the train on which the injury occurred, and sets forth in detail what they, if present, would testify; that five days before the cause was set for trial counsel at Oklahoma City had wired the general solicitor at St. Louis to have said witnesses in attendance on the court on the 26th; that on May 25th another telegram of like import was sent urging their attendance on May 28th; that the reason why said witnesses were not present was that they were prevented from attending on account of high water, etc. We do not think the court erred in holding the application insufficient, and refusing to grant a continuance, for the reason that it fails to state where said witnesses reside and the probability of procuring their testimony within a reasonable time. While the application is sworn to and recites that affiant "verily believes that the statements contained in the above application for continuance are true," it fails to state that the facts affiant believes said witnesses will prove are by affiant believed to be true, as required by Wilson's Rev. & Ann. St. Okl. § 4504. While this is not the only view in the application, we think it sufficient upon which to base the overruling of the application, especially as it is a universal rule that the granting or refusing to grant a continuance of a cause rests largely in the sound discretion of the trial court. *Murphy et al. v. Hood & Lumley*, 12 Okl. 593, 73 Pac. 261.

In support of defendant's assignment that the judgment is contrary to law and the evidence, defendant contends that the evidence was insufficient to take the question of defendant's negligence to the jury. There is no conflict in the testimony. It discloses, in substance, that on August 17, 1907, plaintiff, after purchasing a ticket at Durant, boarded the caboose attached to a freight train on the defendant's line of road to go westward to Mead; that, on approaching Mead, the station was signaled and called out and the train slowed up, and, on reaching there, stopped at the depot platform for passengers to alight; that the conductor standing in the side door of the caboose motioned for

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plaintiff to get off; that he arose and started northward to go out the door when the train instantly and without warning gave a quick jerk or start and stopped, which threw him off his feet, and against the edge of the open door, and seriously injured him. We think the evidence sufficient to establish negligence on the part of defendant. As stated by this court in *St. Louis & San Francisco Railroad Company v. Gosnell*, 101 Pac. 1127, 22 L. R. A. (N. S.) 892, it is the duty of a railroad company, carrying passengers for hire on its freight train, to exercise the same degree of care as is required in the operation of its regular passenger trains; the difference only being that the passenger on a freight train submits himself to the inconvenience and danger necessarily attending that mode of conveyance; that it is only the inherent hazards of this mode of conveyance which are assumed by the passenger in taking passage on a freight train, and not hazards from peril arising from negligence or want of proper care on the part of those in charge of the train. See *Whitehead v. St. Louis, I. M. & S. Ry. Co.*, 99 Mo. 263, 11 S. W. 751, 6 L. R. A. 409; *McGee v. Mo. Pac. Ry. Co.*, 92 Mo. 208, 4 S. W. 739, 1 Am. St. Rep. 706; *Wagner v. Mo. Pac. Ry. Co.*, 97 Mo. 512, 10 S. W. 486, 3 L. R. A. 156; *Hays v. Wabash Ry. Co.*, 51 Mo. App. 438; *Guffey v. Han. & St. J. Ry. Co.*, 53 Mo. App. 462; *Ohio & Miss. Ry. Co. v. Dickerson*, 59 Ind. 317; *Chicago & Alton Ry. Co. v. Arnol*, 144 Ill. 261, 33 N. E. 204, 19 L. R. A. 313; *Olds v. New York, etc., Ry. Co.*, 173 Mass. 73, 51 N. E. 450.

When either freight or passenger trains carry passengers for hire, the contract of carriage necessarily includes the furnishing of reasonable opportunity to alight from the train safely at the end of the journey. *Chicago & Alton Railroad Co. v. Julia F. Arnol*, 144 Ill. 261, 33 N. E. 204, 19 L. R. A. 313, citing *Pennsylvania R. Co. v. Aspell*, 23 Pa. 147, 62 Am. Dec. 323; *Imhoff v. Chicago & M. R. Co.*, 20 Wis. 344; *Jeffersonville R. Co. v. Hendricks*, 26 Ind. 228; *Burrows v. Erie R. Co.*, 63 N. Y. 556; *Dougherty v. Chicago, B. & Q. R. Co.*, 86 Ill. 467; *Wabash St. L. & P. R. Co. v. Rector*, 104 Ill. 296. And a failure to furnish such reasonable opportunity, resulting in injury to the passenger, is actionable negligence on the part of the company. The rule also applies to street railways, and, it would seem, to every other mode of public service transportation.

Birmingham, etc., Railroad Co. v. Hale, 90 Ala. 8, 8 South. 142, 24 Am. St. Rep. 748, was a suit in damages for personal injury. The court held, in effect, that, where the evidence shows the injuries to have been received by a passenger in alighting from one of defendant's street cars and was caused by the driver starting the car with a jerk as the passenger was in the act of alighting, the same was sufficient to establish a prima facie case of negligence, and shift the burden of disproving it to defendant;

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or, in effect, that in such circumstances the doctrine of *res ipsa loquitur* applies. *Dougherty v. Missouri Railroad Co.*, 81 Mo. 325, 51 Am. Rep. 239, states the rule thus: "Without reviewing the authorities, the following proposition is clearly deducible: That where the vehicle or conveyance is shown to be under the control or management of the carrier or his servants, and the accident is such as under an ordinary course of things does not happen, if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care. *Scott v. Dock Co.*, 10 Jur. (N. S.) 1108; *Briggs v. Oliver*, 4 Hurl. & Col. 407; *Mullen v. St. John*, 57 N. Y. 568, 569 [15 Am. Rep. 530]." In *Deming v. C., R. I. & P. Ry. Co.*, 80 Mo. App. 158, as to what was sufficient proof of negligence to take the case to the jury, the court said: "In respect to the defendant's instruction in the nature of a demurrer, it is needless to say that the evidence disclosed by the record was ample to make out a *prima facie* case entitling the plaintiff to a submission to the jury. If the defendant did not stop its train at the station of plaintiff's destination, or if, in doing so, it did not stop a sufficient length of time to afford plaintiff a reasonable opportunity to leave the same, * * * defendant was guilty of such a breach of duty as to render it liable for any damages resulting to the plaintiff therefrom. *Eichorn v. Railway*, 130 Mo. 575 [32 S. W. 993]." *Chicago & Alton Railroad Co. v. Julia F. Arnol*, 144 Ill. 261, 33 N. E. 204, 19 L. R. A. 313, was a suit in damages for personal injuries. The facts were that appellee took passage on defendant's "accommodation train" consisting of a caboose attached to its regular freight train, to ride from Bloomington to Shirley. Upon approaching Shirley, a north-bound freight was found standing upon the main track, and the south-bound train, upon which appellee was a passenger, was required to take the siding. After doing so the caboose stopped twice—the first time near the north end of the platform, and was then jerked forward, and finally stopped at the south end. The first stop was very short, and was made after the usual station signal and call had been given by the brakeman. After hearing the signal and call, upon the train coming to a standstill, appellee arose from her seat with the intention of leaving the train, when, instantly and without warning, the caboose was jerked violently forward, and she was thrown down upon the floor of the car, and injured. There was judgment for appellee in the trial court, which was affirmed by the Supreme Court. Speaking of the duty of the railroad company to furnish her a reasonable opportunity to alight from the train safely at the end of the journey, and the implied invitation she had received to alight, the court said: "If she, by reason of such apparent invitation, was placed in peril from the further movement of the train, the duty at once arose on the part of ap-

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pellant to stop its train a sufficient length of time to permit her to leave it in safety, or to warn her of the danger, in time to avert injury; and it could not, in such case, be material whether the shock of the train producing the injury was an incident of the ordinary operation of the train, or was extraordinary, and unnecessarily violent. The duty of the carrier was to be measured by the peril to the passenger, whom it had accepted and undertaken to safely carry, and who had been induced by the conduct of its servants to assume a position of danger." And in the syllabus said: "A railroad company is liable to a passenger on a freight train for injuries inflicted upon him by violently jerking the train without warning after he has arisen in the car to alight just as it stopped at the station platform after the station had been announced in the usual manner"—thereby clearly holding, in effect, that the further movement of the train alone, imperiling plaintiff's safety in alighting, to his injury, in the circumstances, was actionable negligence, and that the doctrine of *res ipsa loquitur* applied. In *McNulta v. Ensich*, 134 Ill. 46, 24 N. E. 631, speaking of the duty of the receiver who was operating the railroad, it was said: "Having by the acts and conduct of his servants justified the plaintiff in attempting to get off the train, the duty of the defendant then attached to stop the train a sufficient length of time to enable the plaintiff to reach the platform in safety." This seems to accord with the universal holding. 5 Am. & Eng. Ency. of Law, 578, and volume 1 of the Supplement 884, note 3; *W. & G. Ry. Co. v. Torbiner, Adm'r*, 147 U. S. 571, 13 Sup. Ct. 557, 37 L. Ed. 284.

We are therefore of opinion that the judgment is neither contrary to the law or the evidence, and that the evidence was sufficient to take the question of negligence to the jury. Our holding here in no way conflicts with our holding in the *Gosnell Case*. In that case we held, in effect, that the doctrine of *res ipsa loquitur* did not apply, for the reason that the injury resulted from a jar incident to the exigencies of the service pending the journey. Here we hold that the doctrine of *res ipsa loquitur* does apply for the reason that the journey had ended; that hence the jar causing the injury was not a risk incident thereto, and not a risk assumed by plaintiff; that it was defendant's duty to stop its train a sufficient length of time to permit him to leave it in safety, and hence it was immaterial whether the jar was incident to the exigencies of the service or not, and that in the circumstances defendant moved the train at its peril. There is no variance between the allegations and proof.

The judgment of the trial court is affirmed. All the Justices concur.

REEMS v. NEW ORLEANS G. N. R. Co.

(Supreme Court of Louisiana. June 6, 1910.)

[52 So. Rep. 681.]

(Syllabus by the Court.)

Carriers—Injury to Passenger—Negligence—Rebuttal.*—Where a passenger was injured without his fault by the derailment of a railroad train, the defendant must show, to rebut the presumption of negligence, that the accident resulted from circumstances against which human care and foresight could not guard. In the absence of evidence showing the particular cause of the derailment of a railroad train, the court is unable to say that it was the result of an accident which could not have been foreseen or prevented by the railroad company.

New Trial—Amount of Recovery—Excessiveness—Remission of Excess.—Where an award of damages is excessive in the opinion of the trial judge, he should compel a remittitur or grant a new trial.

(Additional Syllabus by Editorial Staff.)

Damages—Excessiveness—Personal Injuries.—Plaintiff, injured on a train, did not know that he was hurt until after he reached his home. He had fever, and called in a physician, who found that the ligament connecting the coccyx with the sacrum had been ruptured, and tried palliative treatment for about a month; but, plaintiff growing no better, the coccyx was removed, and plaintiff was ill altogether about two months, suffering considerable pain and inconvenience and incurring an actual expense of \$750 for medical attention, nursing, and medicines, no other pecuniary loss being shown. Held, that a recovery of \$4,500 was excessive and should be reduced to \$2,500.

Appeal from Civil District Court, Parish of Orleans; Walter B. Sommerville, Judge.

Action by Philip F. Reems against the New Orleans Great Northern Railroad Company. Judgment for plaintiff, and defendant appeals. Modified and affirmed.

Farrar, Jonas, Goldsborough & Goldberg, for appellant.

Buck, Walshe & Buck, for appellee.

LAND, J. This is a suit for damages for personal injuries sustained by the plaintiff while a passenger on one of defendant's trains.

*For the authorities in this service on the subject of the rebuttal of the presumption of negligence on the part of the carrier arising from the fact that a passenger was injured, see second foot-note of *Gay v. Milwaukee Elec. Ry. & L. Co.* (Wis.), 34 R. R. R. 1, 57 Am. & Eng. R. Cas., N. S., 1.

Reems v. New Orleans G. N. R. Co

Defendant appeals from a verdict and judgment in favor of the plaintiff in the sum of \$4,500, with interest and costs.

That the plaintiff, a passenger, was injured by the derailment of defendant's train, is clearly shown by the evidence.

The real defense is that the accident happened without the fault or negligence of the defendant.

The evidence shows that, while the train was running at the rate of 30 miles per hour, the truck of the tender left the rails. The tender and the first coach were wrecked, and the track at the place of the accident was torn and damaged.

The burden of proof is on the carrier to show why the contract of safe carriage was not fulfilled. *Spurlock v. Traction Co.*, 118 La. 4, 42 South. 575; *Le Blanc v. Sweet*, 107 La. Ann. 355, 31 South. 766, 90 Am. St. Rep. 303.

In *Patton v. Pickles*, 50 La. Ann. 865, 24 South. 290, this court affirmed the doctrine that, in a case like this, the defendant is bound to show that the inexecution of the contract resulted from accidental and uncontrollable events. Civ. Code, § 2754. *Thompson on Carriers of Passengers*, p. 210, expresses the common-law rule as follows:

"In other words he must show, in order to rebut the presumption, that the accident resulted from circumstances against which human care and foresight could not guard."

The evidence adduced by the defendant fails to show the cause of the accident, and, in the absence of such explanation, the court is unable to say that the accident resulted from circumstances against which human care and foresight could not guard. Trucks do not leave the rails without some physical cause, such as defects in the trucks, or in the track, or some fault in the operation of the train.

A number of other passengers were injured in the same wreck, and one of them testified, without objection, that defendant had settled with him for his injuries, and had attempted to make a like settlement with the plaintiff.

The remaining question is as to the quantum of damages, which the defendant contends is manifestly excessive. The trial judge concurred in this view, and should have granted a new trial or compelled the plaintiff to enter a remittitur of the excess. After a careful review of the evidence, we agree with our learned Brother that the award is excessive, considering the nature of the injury and its consequences.

Plaintiff did not know that he was hurt until after he reached his home. He had fever, and called in a physician, who on examination found that the ligament connecting the coccyx with the sacrum had been ruptured. The physician tried palliative treatment for about a month; but, the patient growing no better, the coccyx was removed by a surgical operation. Plaintiff was

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ill altogether about two months, and doubtless suffered considerable pain and inconvenience.

The plaintiff incurred an actual expense of \$750 for medical attention, nursing, medicines, etc. No other pecuniary loss is shown. There remains \$3,750 for the injury, with its attendant pain and suffering. This amount is out of proportion in comparison with the usual awards for the loss of an arm, or leg, or other severe bodily injury, which in this jurisdiction seldom exceeds \$6,000 or \$7,000.

We think that a verdict for \$2,500, inclusive of the expenses, would have been amply remunerative in a case of this kind.

It is therefore ordered that the verdict and judgment appealed from be amended by reducing the amount thereof from \$4,500 to \$2,500, and that as thus amended said verdict and judgment be affirmed; plaintiff and appellee to pay costs of appeal.

MORRIS v. COLORADO MIDLAND RY. CO.

(Supreme Court of Colorado, June 6, 1910.)

[109 Pac. Rep. 430.]

Torts—Right to Vote—Prevention—Intent.—Where a qualified voter is prevented from voting, there is no cause of action, unless the act of the party so preventing was sinister.

Elections—Right to Vote—Personal or Property Right.—The right of a qualified elector to vote is neither a property right nor right of person, but is a political privilege.

Damages—Interference with Right to Vote—Presumption as to Damage.—Where one is injured in respect of property or person as the result of negligence of another, however unintentional the injury, the law implies damage and permits recovery, but it is otherwise where one loses his vote through the fault of another, in which case the law implies damage only where malice is shown, malice being the gist of the action.

Negligence—Unintended Consequence—Prevention of Voting.—The mere fact that one has been unable to enjoy a political right, as the unintentional result of the negligent conduct of another, gives no right of action although the loss may be the natural consequence of such conduct.

Carriers—Breach of Contract—Damages.—In an action against a carrier for failing to carry plaintiff to a certain place and return him in time to transact certain business and to vote at the general election, the loss of plaintiff's vote could not be included as an element of damages where his right to vote had not been questioned, and no humiliation or indignity was offered him, and the defendant purely through accidental happening failed to return plaintiff in time.

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Error to District Court, City and County of Denver; Booth M. Malone, Judge.

Action by Ernest Morris against the Colorado Midland Railway Company. Judgment for plaintiff for partial relief, and he brings error. Affirmed.

Thomas B. Stuart, Charles A. Murray, and Robert M. Work, for plaintiff in error.

Rogers, Cuthbert & Ellis (Pierpont Fuller, of counsel), for defendant in error.

BAILEY, J. The action is for an alleged breach of a special contract, on the part of the defendant railway company, in failing to carry the plaintiff from Denver to Glenwood Springs, and return him to the former place in time to meet certain business engagements on November 8, 1904, and to vote at the general election then holden. Damage is laid in the sum of \$16.35 for loss of time and money necessarily expended because of delay, and at \$10,000.00 for being deprived of the privilege of voting. There is no claim or proof of other special damage.

At the close of the plaintiff's evidence the court instructed a verdict for \$16.35, declining to allow the jury to consider the question of the loss of plaintiff's vote as an element of damage, no willful or malicious motive having been either alleged or proven.

Inasmuch as the defendant does not seek a reversal of this judgment, on the ground that there was no special, specific agreement to get plaintiff back at a time certain, let it be assumed, for the purposes of this decision, that there was such agreement, though we do not so hold, it being unnecessary in this case to determine that question.

Is the fact that the plaintiff lost his vote, because of the negligent manner in which the defendant operated its road and conducted its train, to be reckoned as an element of damage in his favor and against the company as for breach of contract? The question is whether, where one has, as the incidental and indirect result of an unintentional, though negligent, fault of another, been deprived of his vote, the latter can be mulcted in damages, on account of such loss, there being no pretense of improper motive in the transaction. The deprivation complained of was, according to the proofs, clearly the result of accident, not of design, indeed there is no contrary contention.

The weight of authority is to the effect that where a qualified voter is prevented from exercising his right to vote, there is no cause of action, unless the act of the party so preventing was sinister. *Carter v. Harrison*, 5 Blackf. (Ind.) 138; *Perry v. Reynolds*, 53 Conn. 527, 3 Atl. 555; *Morgan v. Dudley*, 18 B. Mon. (Ky.) 693, 68 Am. Dec. 735; *Caulfield v. Bullock*, 18 B. Mon. (Ky.) 494; *Miller v. Rucker*, 1 Bush. (Ky.) 135; *Jenkins*

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v. Waldron, 11 Johns (N. Y.) 144, 6 Am. Dec. 359; *Weckerly v. Geyer*, 11 Serg. & R. (Pa.) 35; *Isaacs v. McNeil*, 44 Fed. 32, 11 L. R. A. 254; *Patterson v. D'Auterive*, 6 La. Ann. 467, 54 Am. Dec. 564; *Dwight v. Rice*, 5 La. Ann. 580; *Bevard v. Hoffman*, 18 Md. 479, 81 Am. Dec. 618; *Friend v. Hamill*, 34 Md. 298; *Gordon v. Farrar*, 2 Doug. (Mich.) 411; *Pike v. Megoun*, 44 Mo. 491; *Wheeler v. Patterson*, 1 N. H. 88, 8 Am. Dec. 41; *State v. Smith*, 18 N. H. 91; *Peavey v. Robbins*, 48 N. C. 339; *Rail v. Potts*, 8 Humph. (Tenn.) 225; *State v. Porter*, 4 Har. (Del.) 556; *Griffin v. Rising et al.*, 11 Metc. (Mass.) 339; *Ashby v. White et al.*, 1 Smith, Leading Cases (9th Ed.) 464.

At an early day a different rule was adopted in Massachusetts, and followed in the states of Ohio and Wisconsin, but in all other states, where there has been judicial expression upon the subject, and in England, a rule, contrary to that in Massachusetts, prevails. Even where the Massachusetts rule obtains it is held that only nominal or slight damage should go, except wrongful conduct be charged and proven. *Lincoln v. Hapgood*, 11 Mass. 350; *Jeffries v. Ankeny*, 11 Ohio, 372; *Gillespie v. Palmer*, 20 Wis. 544.

The right of a qualified elector to vote is neither a property right nor right of person. *Anderson v. Baker*, 23 Md. 531; 15 Cyc. p. 280, par. 11, and authorities cited. It can in no sense be said to be an asset of commercial value. It is a privilege bestowed by law, which, although of paramount importance, is not such a privilege as can be measured by, or paid for in, dollars and cents, or speculated upon for pecuniary gain. It is a political privilege, as distinguished from a property or personal right. It is only where the right itself has been assailed and denied, with a pernicious purpose, that a cause of action arises. The damage is then of an exemplary or punitive nature, visited on the evil-doer for his misconduct, rather than as compensation to the party who has suffered the loss. The wrong primarily is against the public, not the individual. The damage is for general protection, to deter others from the commission of like offenses. In this case there is neither averment upon which to base, nor proof to support, exemplary damage, and there is no proof to show actual damage, other than the bare fact that the vote was lost. In general, where one is injured in respect of property or person, as the result of negligence by another, however unintentional the injury, the law implies damage, and permits recovery. It is otherwise where one loses his vote, through the fault of another, unless the loss is occasioned by design. In such case the law implies damage only where malice is shown, that, is malice is the gist of the action. Not only must the party have been deprived of his vote, but such result must be brought about through vicious motive. The mere fact that one has been unable to enjoy a political right, as the unintentional result of the negligent con-

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duct of another, gives no right of action, although the loss may be a natural consequence of such conduct.

We have been unable to find a single reported case, in which a vote has been lost through alleged breach of contract, where an attempt has been made to have the loss included as an element of damage, in suit for such breach, nor has the diligence of vigilant counsel been able to discover one. While this fact is not conclusive of the right, it is at least persuasive to the belief that it does not exist, and surely not where the loss was not deliberately and willfully occasioned. Cases cited, except one hereinafter discussed, involve actions against election officers, and if in those malice is an essential to give a cause of action, all the more should this be true where the suit is against a party, in a purely private capacity.

The case most nearly in point is that of *Griffin v. Rising et al.*, supra, where assessors failed to assess property of the plaintiff, and thus kept him off the list as a qualified voter. The result was that the plaintiff lost his vote, as the indirect, though logical and natural, result of the failure of the defendants to assess his property. He brought suit for this loss, alleging failure and neglect on the part of the assessors to perform their duties. In the face of its former decisions, holding election judges liable for incorrectly rejecting a vote, although done without malice, the court sharply distinguishes this case, and denied liability on the part of the assessors. The court, speaking through Chief Justice Shaw, said:

"The case of a suit against selectmen, for refusing the vote of a qualified voter, and that of assessors, neglecting to tax a citizen, by means of which he is deficient in one of the qualifications of a voter, are manifestly quite distinguishable. In the former, the selectmen act directly upon the party's claim of right to vote, which is regarded as a valuable personal right; and if his vote is refused, supposing him entitled to vote, it is regarded in law as a direct violation of this personal right. But although assessors owe a duty to their constituents and to the public, to assess a tax on every one liable to taxation, yet the right of an individual to be taxed is not *prima facie* a beneficial right to him, and by omitting him they do him no direct wrong. If it operates indirectly to deprive him of a privilege, before it can be charged as a personal injury to him, it must be shown to be done for that or some other sinister or wrong purpose. The court are therefore of opinion, that the assessors are not liable to an action by an individual, who in fact was liable to taxation for his property or poll, for simply omitting to tax him, unless it be shown affirmatively that they omitted to tax him, willfully, purposely, or with design to deprive him of his vote, or unless they had actual knowledge of his liability to taxation, so plain and obvious, that a sinister purpose, and willful omission to tax him, in pursuance of

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such purpose, may be reasonably inferred by a jury. In such case, it would be proper to leave the evidence to a jury, with directions to find for the plaintiff, if they should find that the assessors willfully omitted to tax the plaintiff, knowing him to be liable to taxation, for the purpose of depriving him of his right to vote, or otherwise to injure and oppress him."

The foregoing case is a close parallel to the one at bar. There the plaintiff, as a natural result of the failure and neglect of the defendants to assess his property, lost his vote, the court holding, that unless it affirmatively appear that the defendants purposely and willfully omitted plaintiff from the tax roll, with the intent to deprive him of his vote, there can be no recovery. So here, although it was agreed that plaintiff would get defendant home in time to vote, unless it be shown that the failure to do so was brought about by design, with the willful and malicious object of depriving him of that privilege, there is no cause of action.

On principle and authority we are persuaded that, in computing damages for the alleged breach of contract counted upon in this suit, the loss of plaintiff's vote may not be included as an element. His right to vote was not questioned. No humiliation or indignity was offered him. The defendant, purely through accidental happening, failed to return plaintiff in time to exercise this right. No money damage was thereby occasioned, and none may, therefore, on this score, be recovered, for it has not been, neither can be, shown that plaintiff has suffered, either in reputation, property or person.

The trial court was right in excluding from the consideration of the jury, under the circumstances of this case, plaintiff's loss of vote, as an element of damage for the breach of the contract complained of; and as there is no other question involved, which need be determined, the judgment is affirmed.

Judgment affirmed.

STEELE, C. J., and WHITE, J., concur.

CHESAPEAKE & O. RY. CO. *v.* WILLS.

(Supreme Court of Appeals of Virginia, June 9, 1910.)

[68 S. E. Rep. 395.]

Negligence—"Proximate Cause."*—The "proximate cause" of an injury is that act which directly produced, or concurred directly in producing, the injury in a natural and continuous sequence unbroken by any new cause.

Carriers—Injuries to Passengers—Negligence—Proximate Cause.*—The act of a passenger who boarded the wrong train through the actionable negligence of the carrier failing to inform passengers of the movements and destination of trains, in alighting while the train was in motion, without being directed, advised, or encouraged so to do, by the trainmen, was the act of a responsible agent intervening between the negligence of the carrier and the injury sustained while alighting, precluding a recovery therefor.

Appeal and Error—Disposition of Case on Appeal.—Where plaintiff filed on his own motion an amended declaration after the court had improperly overruled a demurrer to the original declaration, and therein restated his cause of action in the light of the objections urged to the original declaration, the court will presume that plaintiff has made the strongest presentation of his case which the facts permit, and that it could not be bettered if leave were given to amend, and, entering the judgment which the trial court should have entered, will sustain the demurrer and enter judgment for defendant.

Error to Circuit Court, Orange County.

Action by J. Reid Wills against the Chesapeake & Ohio Railway Company. There was a judgment for plaintiff, and defendant brings error. Reversed and rendered.

Williams & Browning, for plaintiff in error.

F. W. Simms, for defendant in error.

*For the authorities in this series on the question what is, and is not, the proximate cause of an injury, see last foot-note of *Erie R. Co. v. Schomer* (C. C. A.), 35 R. R. R. 303, 58 Am. & Eng. R. Cas., N. S., 303; last foot-note of *Brown v. Chesapeake & O. Ry. Co.* (Ky.) 34 R. R. R. 714, 57 Am. & Eng. R. Cas., N. S., 714; *Craig v. Great Northern Ry. Co.* (Wash.), 34 R. R. R. 675, 57 Am. & Eng. R. Cas., N. S., 675; *St. Louis, etc., Ry. Co. v. Pollock* (Ark), 34 R. R. R. 240, 57 Am. & Eng. R. Cas., N. S., 240; last foot-note of *Yeates v. Illinois Cent. R. Co.* (Ill.), 34 R. R. R. 65, 47 Am. & Eng. R. Cas., N. S., 65; fourth foot-note of *Lockwood v. Boston Elev. Ry. Co.* (Mass.), 31 R. R. R. 395, 54 Am. & Eng. R. Cas., N. S., 395.

For the authorities in this series on the subject of the contributory negligence of passengers in alighting from moving trains, see first foot-note of *Chesapeake & O. R. Co. v. Robinson* (Ky.), 35 R. R. R. 205, 58 Am. & Eng. R. Cas., N. S., 205; *Missouri Pac. Ry. Co. v. Irvin* (Kan.), 35 R. R. R. 187, 58 Am. & Eng. R. Cas., N. S., 187.

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KEITH, P. The defendant in error brought suit against the plaintiff in error to recover for an injury sustained in alighting from one of its trains. There was a demurrer to the declaration and to each of its three counts, which the court overruled, and upon a trial before a jury there was a verdict and judgment in favor of the plaintiff, to which a writ of error was awarded.

The only error assigned which we shall find it necessary to consider is to the ruling of the court upon the demurrer to the declaration.

The first declaration was demurred to, grounds of demurrer were assigned and argued, and the judge of the court entered an order overruling the demurrer. Thereupon the plaintiff, upon his own motion, was permitted to amend the declaration, and the defendant demurred to the amended declaration and each count, which demurrer was also overruled by the court.

The first count states that the plaintiff, on the 13th of July, 1907, was a passenger on the defendant's railway, to be carried from its station at Gordonsville to Louisa, in this state, for a certain fare which was paid; that it was the duty of the defendant, with due and proper care and reasonable diligence to carry the plaintiff safely; but that it so carelessly and negligently managed its passenger trains that it misled the plaintiff and caused him to get upon a train that was not bound in the direction that he wished to go, but in an opposite and contrary direction; and that immediately upon getting on board said train the defendant then and there started it and wrongfully carried the plaintiff away from his true destination on a journey different from that upon which it was the duty of the defendant to carry him; whereupon, immediately upon the starting of the train, the plaintiff perceived that he was being carried by defendant away from his destination, and he ran at once to the exit of the passenger coach in which he was, and when the train had not attained any speed, but was moving very slowly, the plaintiff then and there attempted to alight therefrom, and did not apprehend, nor would any ordinary, careful, and prudent man have apprehended, under like circumstances, any danger from alighting; and while thus attempting to alight the plaintiff was thrown under the train by the careless and negligent conduct and management of the defendant in carrying him away from his destination, by reason whereof one of the legs of the plaintiff was crushed and broken so that amputation became necessary.

The second and third counts state the same cause of action, and enter into details setting out the manner in which the plaintiff had been misled into taking a train going in the opposite direction to that in which he desired to go, carrying him, in fact, to the west, when his point of destination was directly to the east. When it comes, however, to narrate what occurred when he discovered that he was being taken away from his true desti-

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nation, his own conduct is described in the second and third counts substantially as was done in the first count.

It may be conceded, in the view that we take of this case, that the railroad company was guilty of actionable negligence in permitting such confusion in the movement of its trains to exist at Gordonsville as misled the plaintiff, acting with reasonable prudence and caution, into entering the wrong train. It may be conceded that it was the duty of the defendant to exercise reasonable care and caution so to inform passengers as to the movement and destination of its trains as to enable those wishing to entrain to enter the train which would take them to the point they wished to reach. It may be further conceded that for the failure to perform that duty the railroad company was responsible for whatever loss or damage the passenger sustained, which could be reasonably expected to result from such negligent act. When, therefore, the plaintiff found himself moving in a direction the opposite of that in which to go, he had, in the case supposed, a complete right of action against the defendant company to recover the damages flowing from the breach of the duty owed to him by the railroad company.

But that is not the injury for which this suit was brought. The plaintiff, finding himself moving from instead of toward his home, went at once to the door of the car and undertook to alight from the train while in motion, and suffered the injury which resulted in the amputation of his leg. It does not appear from the declaration that the defendant directed, requested, encouraged, or suggested that the plaintiff should step from the car while in motion. It does not appear from the declaration that the defendant was advised in any manner of the situation in which the plaintiff found himself. He acted solely upon his own responsibility in alighting from the train, and that act was the proximate cause of the injury which he received, and the negligent conduct of the railroad company in causing him to enter the wrong train, conceding that it was guilty of negligence, was the remote cause.

In *Sherman & Redfield on Negligence*, § 26, it is said: "The proximate cause of an event must be understood to be that which in a natural and continuous sequence, unbroken by any new, independent cause, produces that event, and without which that event would not have occurred. Proximity in point of time or space, however, is no part of the definition. That is of no importance, except as it may afford evidence for or against proximity of causation; that is, the proximate cause which is nearest in the order of responsible causation."

At section 28, the same author says: "Very great difficulty has been found in determining what damages should be considered as flowing, in a 'natural and continuous sequence,' from an act of negligence, especially when it is not a matter of contract

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liability. On the one hand, it has been maintained that, in cases of tortious negligence, the defendant should be held responsible for all damages which do in fact result from his wrongful acts, whether they could have been anticipated or not. On the other hand, it has been maintained that he should not be held responsible for any damages except such as he could, in the exercise of reasonable foresight, have foreseen as the probable consequence of his act. As a middle ground, it has been asserted that he should be made responsible for such damage as is known by common experience to usually follow such a wrongful act. The weight of authority seems to be decidedly against holding the defendant liable for all the actual consequences of his wrongful acts, when they are such as no human being, even with the fullest knowledge of the circumstances, would have considered likely to occur; and, on the other hand, the best authorities seem to be quite opposed to the theory that he should be held liable only for such consequences as he ought himself to have foreseen. So much difficulty, indeed, has been felt in attempting to lay down a rule to cover all possible cases, that some of the ablest judges have declined to state any fixed rule, and have indicated a disposition to leave all doubtful cases to the jury. The practical solution of this question appears to us to be that a person guilty of negligence should be held responsible for all the consequences which a prudent and experienced man, fully acquainted with all the circumstances which in fact existed (whether they could have been ascertained by reasonable diligence or not), would, at the time of the negligent act, have thought reasonably possible to follow, if they had occurred to his mind."

In 32 Cyc. p. 745, several definitions of "proximate cause" are given, among them as follows: "An act which directly produced or concurred directly in producing the injury; that from which the effect might be expected to follow without the concurrence of any unusual circumstances; that which immediately precedes and produces the effect, as distinguished from a remote, mediate, or predisposing cause; that which in a natural and continuous sequence, unbroken by any new cause, produced that event, and without which that event would not have occurred."

In 8 Am. & Eng. Ency. L. p. 571, it is said:

"In the law of damages the proximate cause of an injury may in general be stated to be that act or omission which immediately causes or fails to prevent the injury; an act or omission occurring or concurring with another, where, had it not happened, the injury would not have been inflicted, notwithstanding the latter. Where an efficient producing cause for injuries is found, it will be considered the proximate cause, unless another cause or causes, not incident to but independent of it, are shown to have intervened and produced the

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injury. The question must always be, therefore, whether there was any intermediate cause disconnected from the primary act and self-operating, which produced the injury; an inquiry to be answered in accordance with common understanding. Where this question can be answered in the affirmative, the independent and intervening cause will be regarded as the proximate cause, and the author of the original act discharged. * * *

"The primary cause may be the proximate cause of a disaster, though it may operate through successive instruments. It is not essential, therefore, for a plaintiff to show that an act, claimed to have been the proximate cause of a certain result, was the only cause. It is sufficient if it be established that the defendant's act produced or set in motion other agencies, which in turn produced or contributed to the final result. Where, however, the connection is not immediate between the injurious act complained of and the consequence, such nearness in the order of events and closeness in the relation of cause and effect must subsist that the influence of the injurious act predominates over that of other causes and concurs to produce the consequence."

These principles are in accordance with the decisions of this court.

In *Fowlkes v. Southern R. Co.*, 96 Va. 742, 32 S. E. 464, it was said: "That the defendant was guilty of negligence is conceded, and that it is liable in damages for the direct consequences of that negligence is also conceded. * * * It is not only requisite that damages, actual or inferential, should be suffered, but this damage must be the legitimate sequence of the thing amiss. The maxim of the law here applicable is that in law the immediate, and not the remote, cause of any event is regarded. In other words, the law always refers the injury to the proximate, not to the remote cause. If an injury has resulted in consequence of a certain wrongful act or omission, but only through or by means of some intervening cause, from which last cause the injury followed as a direct and immediate consequence, the law will refer the damage to the last or proximate cause, and refuse to trace it to that which was more remote. To the proximate cause we may usually trace consequences with some degree of assurance, but beyond that we enter a field of conjecture where the uncertainty renders the attempt at exact conclusions futile. If the wrong and the resulting damage are not known by common experience to be naturally and usually in sequence, and the damage does not, according to the ordinary course of events, follow from the wrong, then the wrong and the damage are not sufficiently conjoined or concatenated as cause and effect to support an action."

And in *Scheffer v. Railroad Co.*, 105 U. S. 249, 26 L. Ed. 1070, Mr. Justice Miller said: "To warrant the finding of negligence, or an act not amounting to wanton wrong, as the proximate cause

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of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances."

In *Jammison v. Chesapeake, etc., R. Co.*, 92 Va. 327, 23 S. E. 758, 53 Am. St. Rep. 813, it was held that, if a passenger train fails to stop at a station to which a passenger has purchased a ticket, it is the duty of the passenger to retain his seat until he arrives at the next station at which the train stops; and, if he feels aggrieved, to institute his action against the company for any loss or injury he may have sustained by reason of the failure to stop the train at the proper station. But if he fails to do this, and, in passing from one coach to another in search of the conductor to get him to stop the train, he is thrown from the train and injured, his negligence is the proximate cause of the injury, and he cannot recover damages of the company therefor.

In this case the negligence of the railroad company consisted in such acts of omission and commission alleged in the declaration as resulted in the plaintiff getting upon the wrong train, and upon the authority of the case just cited there was an ample remedy for whatever wrong he had sustained by reason of the defendant's negligence. The direct and efficient cause of the injury for which this suit was brought was the alighting from the train while in motion. In that act the railroad company had no part. As we have seen, the declaration does not aver that any agent of the company directed, advised, encouraged, or even had knowledge of the plaintiff's intention to alight from the train; so that, between the negligent act of the railroad company and the injury suffered by the plaintiff, there was the intervening act of a responsible agent, that responsible agent being the plaintiff himself. While the plaintiff as a result of the defendant's negligence had taken the wrong train, but was in a place of safety and of his own accord alighted from the train, it cannot be said that the injury which he then received was the natural and continuous sequence, unbroken by any new or independent cause, of the negligence of the defendant which caused him to enter the wrong train.

For these reasons, we are of opinion that the demurrer to the declaration and each count thereof should have been sustained; and, in view of the fact that the plaintiff filed a declaration to which the defendant demurred and the court overruled the demurrer, and that the plaintiff then, of his own motion, filed an amended declaration, in which he restated his cause of action, in the light of the objections which had been urged to his original declaration, it is to be presumed that he has made the strongest presentation of his case which the facts permit, and that it could not be bettered if leave were given to amend; and this court, entering such judgment as the circuit court ought to have

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rendered, will sustain the demurrer and enter a final judgment for the plaintiff in error.

Reversed.

BUCHANAN, J., absent.

WHITTLE, J. I concur in the result reached by the President in this case. But I am of opinion that neither the original nor amended declaration states a case of actionable negligence against the defendant.

SOUTHERN RY. CO. v. LEE.

(Supreme Court of Alabama, May 19, 1910.)

[52 So. Rep. 648.]

Carriers—Carriage of Passengers—Protection of Passengers.*—It is the duty of a carrier's employees to prevent, as far as possible, use by passengers of profane and insulting language in the presence of a female passenger.

Carriers—Carriage of Passengers.—Though a rule of a railroad or a state law prohibited colored passengers from riding in the same coach with white passengers, this did not justify the carrier's employees in permitting other passengers to use profane and indecent language in their effort to compel a colored servant accompanying a white passenger to leave the coach.

Pleading—Issues, Proof, and Variance.—If there is an entire lack of proof as to any material averment of the complaint, necessary to a recovery, the general charge should be given, on proper request, in favor of defendant.

Pleading—Issues, Proof, and Variance.—Where a single count contains several distinct independent averments, each presenting a substantial cause of action, proof of either cause will authorize a recovery; but, where all of the averments combined make up the averment of one cause of action, it is necessary to prove each averment.

Pleading—Issues, Proof, and Variance.—Exact correspondence of allegation and proof is not required; it sufficing that one substantially corresponds with the other.

Carriers—Injury to Passenger—Pleading—Issues, Proof, and Variance.—In a female passenger's action against a railroad for damages through defendant's employes permitting other passengers to use offensive language, in an effort to compel plaintiff's colored servant to leave the car, an allegation that plaintiff's condition was so feeble as

*See foot-note of *Widener v. Philadelphia Rapid Transit Co.* (Pa.), 34 R. R. R. 6, 57 Am. & Eng. R. Cas., N. S., 6; first foot-note of *Norris v. Southern Ry.* (S. Car.), 33 R. R. R. 208, 56 Am. & Eng. R. Cas., N. S., 208.

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to be open to ordinary observation only affected the gravity of defendant's negligence, and failure to prove the same was not fatal to the action.

Appeal from Circuit Court, Wilcox County; B. M. Miller, Judge.

Action by Lillian C. Lee against the Southern Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

The substance of the complaint is sufficiently set out in the opinion. The third plea interposed by defendant is as follows: "For further answer to plaintiff's complaint, and each count thereof, severally and separately, this defendant says: *Actio non*; for it say that at the time of the alleged grievances and happenings on said train, the plaintiff was riding, and had with her on the first-class coach reserved for white passengers a negro boy or young man; that the other passengers on said train objected to the said negro riding in the coach so reserved for white passengers, as they had a right to do, and on account of plaintiff's wrongful failure or refusal to have the said negro moved out of said coach and into the coach or compartment reserved for colored passengers, the said white passengers indulged in conduct and language to induce the said negro to get out of said car and go into the car for colored people. And defendant avers that by reason of the breach of her duty as a passenger by plaintiff, in bringing or keeping the said negro in said car, the said language and conduct was indulged in by said alleged male passengers." Plea 5 alleges the same state of facts with the additional allegation that under and by virtue of the laws of Tennessee it is provided in substance and legal effect that negroes and white passengers shall ride in separate coaches and compartments, and not in the same compartments or coaches.

Pettus, Jeffries, Pettus & Fuller, for appellant.

Daniel Partridge, Jr., and *N. D. Godbold*, for appellee.

SIMPSON, J. This action was brought by the appellee against the appellant, on the contract between the appellee, as a passenger, and the appellant. The case was submitted to the jury on the first and second counts of the amended complaint. The first count sets out the contract, by which the defendant undertook to carry the plaintiff from Pine Hill, in Wilcox county, Ala., to Lenoir, in North Carolina, and return, and alleges that, on the return trip, at a point between Knoxville and Chattanooga, in the state of Tennessee, the servants or agents of the defendant failed "to use ordinary diligence to preserve order among certain male passengers who were then and there engaged in disorderly conduct on said train, but, to the contrary, did negligently allow or permit said male passengers * * * to engage in disorderly conduct, to use obscene, indecent, threatening,

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profane, and insulting language in the presence and hearing of plaintiff and in close proximity to her"; that said conduct was known to said servants, or by the use of proper care could have been ascertained and prevented; that plaintiff is a woman and was in a weak and debilitated condition, which was known to said servants, or could have been seen by them by the use of ordinary powers of observation; that said language and conduct was reasonably calculated to, and did greatly terrify, alarm, frighten, and injure plaintiff, and as a proximate consequence thereof she suffered a complete physical collapse, fainted, etc., and suffered serious consequences, which are set out. The gravaman of the second count is that the car was greatly crowded, that it was impossible for the servants and agents, by reason of the inadequate number of the same, to perform the duties of caring for and protecting the passengers, and to meet the needs of ordinary conditions of travel; but it goes on to allege that said servants, by the use of due diligence, could have learned of the disorderly conduct, etc., and prevented the injury, but that defendant failed or neglected to provide an adequate number of servants to meet the needs of ordinary conditions of travel.

There was no error in sustaining the demurrer to plea 3 interposed by the defendant. Said plea does not allege or show that there was any law or rule prohibiting colored passengers from riding on the same coach with white passengers, and, if there was such a law or rule, that would not justify the employees of defendant, in charge of said coach, to permit passengers to use profane, obscene, and indecent language in the presence of female passengers. That is not the way to enforce such a rule.

There was no error in sustaining the demurrer to plea 5. While it is sometimes stated that a carrier is not liable for mere rudeness of one passenger, to another, which does not amount to a breach of the peace, and the illustrations generally given are such as rudeness, by passengers, in passing out of a car by pushing others, etc. (2 Hutchinson on Carriers [3d Ed.] § 983, and notes), yet liability for the mere rudeness of a passenger, and liability for the negligence of the servants of the carrier, in permitting the continuance of said rudeness, are two entirely different propositions. The laws of the different states, and the respect which public opinion demands for females in this country, show that it is an offense, sometimes punishable criminally, for a man to use profane, indecent, obscene, and insulting language in the presence of females, and it is the duty of the carrier, as far as possible, to prevent such offenses. Even if it was mere rudeness on the part of those who used the language, yet, if the servants of the defendant allowed or permitted the continuance of such language in the presence of the female, it was a breach of the obligations of its contract. 2 Hutchinson on Carriers (3d

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Ed.) §§ 982, 984; 6 Cyc. pp. 602, 603, and notes; Houston, etc., R. Co. v. Perkins, 21 Tex. Civ. App. 508, 52 S. W. 124. If said law was operative as to plaintiff, or to said negro boy, the proper remedy would be for the parties objecting to appeal to the conductor, or other servant of the defendant, to have the negro removed, and when they undertook to enforce it, by the use of offensive, profane, and indecent epithets, it was the duty of the servants of the defendant to use their authority to prevent them from using such language in the presence of the female passenger, and, if it could not be prevented in any other way, to eject them from the coach. If the flagman could not prevent it, it was his duty to call the conductor at once.

The case of N. O. & N. E. R. Co. v. Jopes, 142 U. S. 18, 25, 12 Sup. Ct. 109, 35 L. Ed. 919, has no application to this case. In that case it was affirmed only that a conductor has a right to act in self-defense against a passenger, and it affirms the right and duty of the employees in charge of the train to eject a passenger who uses grossly indecent language. Even if the plaintiff had, as claimed, violated her contract by bringing the negro into the coach (which has not been shown), that would not deprive her of the right of protection. It is not shown that she even refused to comply with any lawful request or demand for the removal of the negro.

It is next insisted by the appellant that, inasmuch as both counts of the complaint aver that the plaintiff was in a weak and debilitated condition, which fact was known, or could have been discovered by the use of ordinary diligence on the part of appellant's employees, and there is a failure of proof as to this material averment, the defendant was entitled to the general affirmative charge.

There is no dispute about the proposition that, if there is an entire lack of proof as to any material averment of the complaint necessary to a recovery, the general charge should be given, on proper request, in favor of the defendant. This is true in some instances, where the matter alleged, though unnecessary, becomes a part of the description of the contract, or other material matter. *Pharr & Beck v. Bachelor*, 3 Ala. 244, 245; *Gilmer v. Wallace*, 75 Ala. 220.

It has also been stated that where a single count contains several distinct, independent averments, each presenting a substantive cause of action, proof of either cause will authorize a recovery; but, where all of the averments combined make up the averment of one cause of action, it is necessary to prove each averment. *Birmingham Railway & Electric Co. v. Baylor*, 101 Ala. 488, 493, 496, 13 South. 793. That was a negligence case, and the court held that the description of the negligence complained of involved that of the person in charge of the switch, in failing to properly fasten it, and also that of the person in

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charge of the train, in failing to properly supply it with necessary equipment, etc., and that both should be proved. The court also held that mere redundancy would be rejected as surplusage.

In a case of suit for damages on a special contract, it was held that, although it was alleged in the complaint that the plaintiff had at all times been ready and willing to perform the services required of him, while the evidence showed that he had engaged in other business, the fact of such employment went only to the amount of damages, and the failure to prove the averment was not fatal to a recovery. *Morris Mining Co. v. Knox*, 96 Ala. 320, 322, 11 South. 207.

This court has also said that: "An exact correspondence of allegation and proof is not required. It is enough that the one substantially corresponds with the other." *Wilson v. Smith*, 111 Ala. 171, 176, 20 South. 134, 136.

In the case of *L. & N. R. R. Co. v. Johnston*, 79 Ala. 436, the complaint is not set out *inhæc verba*, but it is stated that the gravamen of the action was that the defendant "willfully refused to stop" the train, and carried the plaintiff several hundred yards beyond, where she was compelled to alight, without her consent, etc., and this court, in addition to saying that, if the failure to stop was merely negligent and not willful, the plaintiff could not recover, said, also, that "it would constitute a variance, if the evidence showed that the plaintiff not merely submitted, but consented to get off the train." The report of this case is not full, but it is evident that the court was not directing its attention to a case in which the first allegation, to wit, that he "willfully refused to stop," was proved, while the last one, to wit, that she was compelled to alight, was not. The court was merely discussing the difference between the allegation and the proof in each branch of the case.

In the later case of *Alabama Great Southern Railroad Co. v. Heddleston*, 82 Ala. 219, 222, 3 South. 53, 55, where the complaint alleged first the misdirection of the ticket agent in putting him on a train which did not stop at his desired destination, and then stated also facts tending to show a wrongful ejection from the train, which last allegation was not proved, this court said: "A full answer to this is that the complaint sets forth and counts on both causes of action. When such is the case, it does not prevent a recovery. The plaintiff succeeds to the extent the proof sustains his allegations, and only fails to the extent his proof fails."

In *Encyclopædia of Pleading & Practice*, vol. 22, these rules are laid down: (1) As a general rule, if part only of the allegations be proved, it is sufficient if what is proved affords ground for maintaining the action (page 567); and (2) that the rule applies only to allegations that are material to the action, or to those immaterial allegations which are so interwoven with those

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that are material as to make the latter depend upon them.” (Pages 533-535.)

In the present case the cause of action is complete without the last allegation referred to. The only office of that allegation would be to add to the gravity of the negligence, and perhaps increase the amount of the damages.

We hold, then, that even though the last allegation was not proved, to wit, that the condition of the plaintiff was so feeble as to be open to ordinary observations, yet the cause of action was made out, and the jury were the judges of the amount of damages for the negligence proved.

The judgment of the court is affirmed.
Affirmed.

DOWDELL, C. J., and McCLELLAN and MAYFIELD, JJ., concur.

ORTH v. SAGINAW VALLEY TRACTION CO.

(Supreme Court of Michigan, July 14, 1910.)

[127 N. W. Rep. 330.]

Evidence—Judicial Notice.*—The court will take judicial notice of the fact that conductors are in control of street cars, and may cause them to be stopped at any time or place if circumstances require it.

Carriers—Taking up Passenger—Care Required.†—The conductor of a street car who is aware that a person is attempting to board the car, or with his consent is about to do so, should not direct the starting of the car, if stationary, nor an increase of speed of the car, if moving, nor should he give the two-bell signal, if that would be understood by the motorman to mean that there was no longer any reason for not putting on power and increasing speed.

Carriers—Injury to Passenger—Evidence—Negligence.—In an action against a street car company for injuries received while boarding a street car, based on the alleged negligence of the conductor in giving the signal to the motorman to increase the speed of the car,

*For the authorities in this series on the subject of judicial notice of things pertaining to railroads, see *Bergan v. Central Vermont Ry. Co.* (Conn.), 34 R. R. R. 426, 57 Am. & Eng. R. Cas., N. S., 426; fifth head-note of *Hoskins v. Northern Pac. Ry. Co.* (Mont.), 34 R. R. R. 174, 57 Am. & Eng. R. Cas., N. S., 174; *Brian v. Oregon S. L. Ry. Co.* (Mont.), 34 R. R. R. 18, 57 Am. & Eng. R. Cas., N. S., 18; first foot-note of *Norfolk & P. T. Co. v. Forrest's Adm'x* (Va.), 33 R. R. R. 472, 56 Am. & Eng. R. Cas., N. S., 472.

†For the authorities in this series on the subject of negligence in starting a street car while a passenger is attempting to board car, find a seat, or alight, see first foot-note of *Ryan v. Pittsfield Elec. St. Ry. Co.* (Mass.), 35 R. R. R. 446, 58 Am. & Eng. R. Cas., N. S., 446.

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causing plaintiff to fall to the pavement, evidence held to sustain a finding of negligence on the part of the conductor in giving the signal.

Trial—Instructions—Assuming Facts.—In an action against a street car company for injuries based upon the alleged negligence of the conductor, in ringing two bells, causing the motorman to increase the speed of the car and causing plaintiff to fall to the pavement while the car was crossing a railroad track, a charge that neither the conductor nor motorman had the right to stop the car upon the crossing for a passenger, and that the motorman was not obliged to retard its speed, and that only in case the acceleration of speed was in consequence of the signal, could plaintiff recover, and that if the jury found that the bell signal, which the plaintiff claims the conductor gave when he boarded the car, was taken by the motorman to mean that he had boarded the car after making the crossing and that the speed was not increased in response to such signal, the verdict should be for defendant, does not assume that the conductor could have controlled the operation of the car over the crossing, by withholding the signal.

Carriers—Injury to Passenger—Boarding Car—Contributory Negligence—Questions for Jury.—Though an attempt by a man of 62 years, weighing 200 pounds, to board a street car going six miles an hour may be negligent and the jury would be justified in so finding, where it was not conclusively shown that the car was going six miles an hour, and where the conductor was apprised of the person's intention to board the car in motion and of the danger, and rang the bell twice, the question of contributory negligence was for the jury.

Carriers—Injury to Passenger—Contributory Negligence.†—One who attempts to board a moving street car assumes the risk of attempting to board the car, but not of negligence in accelerating speed.

Carriers—Injury to Passenger—Evidence—Admissibility.—In an action against a street car company for injuries based on the alleged negligence of the conductor in giving the go-ahead signal, causing the motorman to increase the speed of the car, and causing plaintiff to be thrown to the pavement, where defendant sought to prove that their large cars, including the one in question, had a device upon them that effectually precluded jerking, evidence of witnesses as to their experience while riding on other cars of defendant was proper in rebuttal.

Error to Circuit Court, Saginaw County; Chauncey H. Gage, Judge.

Action by George Orth against the Saginaw Valley Traction

†For the authorities in this series on the question whether it is contributory negligence to attempt to board a moving street car, see last foot-note of *Ryan v. Pittsfield Elec. St. Ry. Co.* (Mass.), 35 R. R. R. 446, 58 Am. & Eng. R. Cas., N. S., 446; *Quinn v. Philadelphia Rapid Transit Co.* (Pa.), 34 R. R. R. 457, 57 Am. & Eng. R. Cas., N. S., 457.

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Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Argued before BIRD, C. J. and OSTRANDER, HOOKER, BLAIR, and STONE, JJ.

Weadock & Duffy, for appellant.

F. E. Emerick, for appellee.

HOOKER, J. The defendant's street car line on Bristol street, in the city of Saginaw, crosses the Michigan Central Railroad. It is the rule that the cars must come to a stop before crossing the steam road, and proceed across the track only after the conductor has alighted from the car, gone to the railroad and ascertained that no train is approaching, and signalled the motorman to proceed. This rule was duly observed on the occasion of plaintiff's injury. At the crossing plaintiff attempted to board the car following the conductor, but fell or was thrown from the running board to the pavement and injured. This action is based upon the alleged negligence of the conductor in ringing two bells, causing the motorman to understand that the conductor was again upon the car, and to turn on the current and accelerate the speed of the car, causing plaintiff to fall or be thrown from the car. The court submitted these questions and that of contributory negligence to the jury, and a verdict and judgment for \$500 followed. Defendant has appealed. Refusal to direct a verdict.

Counsel for defendant assign error upon the refusal of the trial judge to direct a verdict for defendant, contending, first, that there was no testimony tending to show that the conductor's act in ringing the bell was the cause of the accident. It is said that the signal was not to direct the motorman to increase speed, which was a matter for him to decide for himself, inasmuch as it was not proper for him to stop the car upon the crossing, after he had started to cross it, and that it does not appear that an increase of speed at that time and place was not necessary, as the car was running very slowly; power being shut off as it descended the hill.

We are of the opinion that we should take judicial notice of the fact that conductors are in control of street cars, and may cause them to be stopped at any time or place if circumstances require it, and that having knowledge that one is in the act of boarding a car or with his consent about to do so, should neither direct the starting of a stationary car, nor the acceleration of speed of a car in motion, nor what might amount to the same thing, give the two-bell signal, if the same would be understood by the motorman to mean that there was no longer reason for not putting on the power, which would have the effect to start or increase the speed of the car.

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If the plaintiff testified to the truth, he told the conductor of his intention to board the car at that place, and signalled the motorman, and was given reason to believe that the conductor acquiesced. If so, the conductor owed him the duty of protecting him, by omitting the signal which might result in action by the motorman, until plaintiff was in a place of safety. We do not understand what counsel mean by the suggestion that there was no proof that it was not necessary to put on the power at that juncture, unless it is that the car was not in a safe place for stopping, and should not have been allowed to stop there. The circumstances indicate no danger on that occasion, and had the car even come to a standstill on the track (of which there was little danger, as it was running from two to six miles an hour), it would have been better than to injure a passenger. There is a reasonable inference that the motorman, knowing that his conductor was on the ground, would not apply power, until he was apprised by the signal that he was ready to have him do so, and under the circumstances stated by the plaintiff, there was evidence from which the jury might reasonably find negligence on the part of the conductor in giving the signal, and the case so made was well within the declaration.

It is said to have been assumed by the judge that the conductor could have controlled the operation of the car over the road by withholding the signal. The instructions to the jury were that neither conductor nor motorman had a right to stop the car upon the crossing for a passenger, and that the latter was not obliged to retard its speed, and that only in case the acceleration of speed was in consequence of the signal, could plaintiff recover, and the judge expressly said that "if you find from the evidence in the case that the bell signal which the plaintiff claims the conductor gave to the motorman when the conductor boarded defendant's car, as the car was crossing the railroad tracks, was taken by the motorman to mean that the conductor had boarded the car after making the crossing, and that the speed of the car was not increased in response to any such signal, your verdict then would be for the defendant. That is, if the motorman did not, as a matter of fact, increase the speed of the car after the bell was rung, so as to produce a jerk or motion of the car that threw the plaintiff to the ground, but simply considered the bell evidence to him that the conductor was on the car, the plaintiff would not be entitled to recover. It is a question of fact for you to determine from all the evidence in the case whether he did or did not increase the speed, and the increasing speed produce a jerking motion of the car." This instruction is at variance with such an assumption.

2. That contributory negligence was conclusively proved. It must be admitted that an attempt by a man 62 years old, weighing 200 pounds, to board a street car going six miles an hour,

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may well be called negligence, and a jury would be justified in so finding. But in the first place it is not conclusively shown that the car was going six miles an hour, and moreover, the conductor was apprised of plaintiff's intention to board the car in motion, and therefore of the danger, and rang his bell with full knowledge of the situation, according to some of the testimony. We are of the opinion that these were questions for the jury, and we cannot say as matter of law that defendant was precluded from recovering a verdict. Booth on Street Railways, § 336; 27 A. & E. Enc. of Law (2d Ed.) p. 67.

3. That the plaintiff assumed the risk. The learned trial judge instructed the jury that he assumed the risk of attempting to board the car, but not of the negligence in accelerating speed. We think this correct.

4. The starting or jerking of the car. Much is said in the briefs of counsel about the "jerking of the car." Every one knows that the sudden application of brakes, or of power, has a tendency to disturb the equilibrium of one standing in the car or on the running board. It matters not whether the increased motion be a jerk or merely an increase of speed. It is described both ways in the declaration and testimony. Apparently plaintiff's fall was due to the inertia of his body as the car started up. Exception was taken to the testimony of some witnesses as to their experience while riding on other cars of the defendant. This testimony would have been inadmissible but for the fact that defendant sought to prove that their large cars, including the one in question, had a device upon them that effectually precluded jerking. As it was, it was proper in rebuttal. It is contended that Miller's testimony conclusively showed that he fell forward, and hence that it was obvious that it was caused by the brake. This testimony was not important, and in our judgment, cannot have injured defendant. The cause was submitted by an exceptionally good charge, and we find nothing in the proceedings of which defendant can reasonably complain.

The judgment is affirmed.

LINDSEY v. ST. LOUIS, I. M. & S. RY. CO.

(Supreme Court of Arkansas, June 6, 1910.)

[129 S. W. Rep. 807.]

Principal and Agent—Wrongful Acts by Agent—Ratification—Evidence.—Where an employé suing for slander uttered by an agent of his employer, alleged and proved that immediately after the slander he was discharged from his employment, the employer alleging that he was discharged solely because of insubordination to those in authority over him, could prove the employé's incivility to show a cause for his discharge, and therefore that the employer did not ratify the slander.

Trial—Instructions—Conformity to Issues.—Where in slander plaintiff's reputation was not attacked or involved, a charge that the jury would accept as true the allegation that he had the reputation of being an honest man, and had never been suspected of any dishonest practices, was properly refused.

Libel and Slander—Evidence—Instructions.—Where, in an action against a corporation for slander uttered by its agent, the court charged that a malicious intent must be proved, that malice did not mean that the agent had any personal spite against plaintiff, but meant that if the defamatory words were wrongfully and intentionally used they were maliciously used, etc., a charge that the burden of proof was on plaintiff to show that the slander was uttered with malicious intent on part of the corporation, etc., was not erroneous.

Appeal and Error—Questions Reviewable—Instructions.—A party may not complain because the court repeated an instruction given at his request.

Corporations—Liability for Slander by Agent.*—A corporation is not liable for slanderous words uttered by its employés unless it authorized, approved, or ratified the act of the agent in uttering the slander, since slander is the individual act of him who utters it, and the utterance of a slander by an agent of a corporation must be ascribed to the personal malice of the agent rather than to an act performed in the course of the employment and in the interest of the corporation.

Libel and Slander—Evidence—Instructions.—Where, in an action by an employé of a railroad company for slander uttered by a special agent engaged in finding stolen freight, a conductor testified that the special agent asked him if he had taken the cars carrying the freight, and, plaintiff had not unloaded the freight, that the special agent stated that he wanted to stick plaintiff for the freight, and

*For the authorities in this series on the question whether a railroad corporation may be held responsible for slander or libel, see second foot-note of *Hypes v. Southern Ry. Co. (S. Car.)*, 32 R. R. R. 145, 55 Am. & Eng. R. Cas., N. S., 145.

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wanted the conductor to clear himself, a charge that if the language, though charging plaintiff with larceny of the freight, was spoken in the course of duty and that it was necessary in the course of the investigation to make the communication and there was no malicious intent to injure plaintiff, the communication was privileged, was justified.

Appeal from Circuit Court, Drew County; H. W. Wells, Judge.

Action by O. J. Lindsey against the St. Louis, Iron Mountain & Southern Railway Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Austin & Danaher and Patrick Henry, for appellant.

W. E. Hemingway, E. B. Kinsworthy, E. A. Bolton, and Jas. H. Stevenson, for appellee.

BATTLE, J. O. J. Lindsey charged the St. Louis, Iron Mountain & Southern Railway Company with slandering him. He alleged in his complaint: That he was employed by the defendant as station agent at Monticello, in this state. "That while he was so employed, about 21st day of October, 1907, the defendant, through its agents and servants, negligently, recklessly, willfully and maliciously slandered him by stating in the presence and hearing of L. H. Edwards, P. T. Hammock and Ed Ahrens that 2 cars of cotton had been stolen out of the yards of the defendant at Dermott and brought to the station of Monticello, and 14 bales had been unloaded in the depot, and that plaintiff got said cotton, and asking him what he did with it.

"That the servants of defendant who spoke said slanderous words of plaintiff were O. J. Cantley and C. Perman, who were special agents in the employ of defendant for the purpose of finding said missing cotton, and said charge was made by them in furtherance of the defendant's business, which they were employed to do for the purpose of ascertaining whether plaintiff was the guilty person or had guilty knowledge of the matter, and of inducing him, if guilty, to confess it.

"That said slanderous words were wholly false, and were spoken maliciously and without probable cause, and plaintiff had not then or since then received said cotton, and had no knowledge concerning it.

"That thereafter he demanded of defendant that the slanderous charge be retracted, but defendant failed and refused to retract. That immediately after said slanderous charge defendant discharged him from its employ. That previous to that time he had the reputation in the community where he lived of being an upright, honest man, and had never been charged with or suspected of being engaged in any dishonest practice whatever. That said Edwards, Hammock and Ahrens, before whom the

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slandorous words were uttered, were citizens and residents of Monticello, where plaintiff lived.

"That by reason of the said slander plaintiff had been damaged in his business standing and otherwise in the sum of \$10,000, and that by reason of the willful, reckless, and malicious conduct of defendant in uttering said slander, defendant became indebted to him in the sum of \$20,000 punitive damages." He asked judgment for \$30,000.

The defendant answered and denied that its servants used the slanderous language complained of, or any other language which amounted to charging plaintiff with larceny or any other crime, or that such language was used for the purpose of ascertaining the guilty knowledge of plaintiff with respect to said cotton and of inducing him to confess. It denies that Cantley and Perman had authority to charge any person with having stolen the cotton, or to use any other language which would injure him in his business standing. Defendant had no knowledge of the truth or falsity of the words alleged to have been spoken further than that the cotton was taken from the yards at Dermott, and had at no time charged plaintiff with having taken it, or been a party to the publication of such a charge. It denies: That he demanded that it retract the charge or that it refused to do so. That never having made or authorized the charge, it had nothing to retract.

That no language was used toward or about plaintiff calculated to injure him in his reputation, socially or in business circles, or calculated to charge him with a crime, but all that was said was to give him such facts as had been ascertained concerning the loss of the cotton to enlist his assistance in finding it. That all communications made to him were of privileged character and without intent to injure him and without any suspicion of his guilt.

"It admits that it discharged him, but denies that it was on account of said cotton being lost, and says it was solely on account of his insubordination to those in authority over him. It denies that he was damaged as alleged in the complaint or in any other sum, and prays to be dismissed."

A jury tried the issues in the case and returned a verdict in favor of the defendant, and plaintiff appealed.

Both parties adduced evidence for the purpose of proving the allegations of their respective pleadings.

Among other things plaintiff testified in his own behalf that he was discharged from the service of the defendant immediately after he was accused of having or taking the missing 14 bales of cotton.

The defendant adduced evidence, over the objection of the plaintiff, to prove that he was discharged from its service on account of incivility while acting as its agent.

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George M. Parker testified, in behalf of the plaintiff, substantially as follows: "I am a conductor in the employ of the defendant, and in 1907 ran the freight train between McGehee, Arkansas City and Warren, passing through Monticello. There were two crews on that run. Conductor Weed was the other conductor. I know C. Perman special agent for defendant. In October, 1907, Perman came into the lunch room at McGehee and said he wanted to talk to me. We went outside, and he asked me if I didn't take two cars of cotton out of the Dermott yards to Monticello about the 15th of October, and if O. J. Lindsey, the agent at Monticello, didn't unload this cotton there. I told him I didn't take the cars over to Monticello, and I had no record of handling them. He turned and asked me what I did with the 14 bales of cotton, and I told him I didn't know anything about the cotton at all. He told me if I was mixed up in these 14 bales of cotton, I had better get clear and unload on Lindsey. I told him I knew nothing whatever of the cotton. He said that he wanted to stick Lindsey for the 14 bales of cotton, that they knew where the cotton was and could lay hands on it, and wanted me to get in the clear."

The court instructed the jury at the request of the plaintiff, in part, as follows:

"(1) A slander is any publication or utterance which accuses a person of a crime punishable by law, or which amounts to a charge of having been guilty of any dishonest business or transaction, the effect of which would be to injure the credit or business standing of the person so slandered."

"(8) In order to award punitive or exemplary damages it must appear that the slanderous words were spoken of the plaintiff by the defendant through its agent acting within the scope of his employment, with malice. Malice, as used in this instruction, does not mean that the agent using the alleged slanderous words must have any personal spite, ill will or hatred of the plaintiff, but means if the defamatory words complained of were wrongfully used, and were used intentionally, without just cause or excuse, or in wanton and reckless disregard of the rights and feelings of the plaintiff, then, in the legal sense, they were maliciously used.

"(9) While it is true that malicious intent is not to be presumed, but must be proven, this proof need not be in the form of direct testimony, but may be shown by circumstantial evidence. It is for the jury to say, after considering the language of defendant's agent complained of, together with all the circumstances attending its utterance, whether such slanderous words were or were not spoken with malice, either express or legal, as hereinbefore defined."

And refused to instruct as follows:

"(2) You are instructed that it is alleged, and not denied, that

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the plaintiff had the reputation in the community in which he lived of being an upright, honest man, and he had never been charged or suspected of any dishonest practice of any kind whatever, therefore you will accept said allegation as proven."

And instructed them at the request of the defendant, over the objections of the plaintiff, as follows:

"(1) The court instructs the jury that the burden of proof is on the plaintiff in this case to prove by a clear preponderance of the evidence that the language complained of as set out in the complaint was used and published by the agent or agents of the defendant as alleged, and that such agent was acting under the authority of the defendant and acting within the scope of his employment in using such language, or that the defendant had afterwards ratified the same, and to prove that, as a result of such slanderous publications by the agent of defendants, the plaintiff has been damaged in his character and reputation, and it must further appear that the slander was uttered with the malicious intent on the part of the defendant company to injure the plaintiff in his business or social standing.

"(2) The court instructs the jury that unless it appears to your satisfaction by a fair preponderance of the weight of the testimony after a careful comparison of all the evidence in the case that the language set out in the complaint was uttered or published toward or about the plaintiff by the agent or agents of the defendant, acting within the scope of their authority, you will not be warranted in presuming that any language was used which was detrimental to plaintiff's character or reputation, nor was intended to be used in a slanderous way, but the presumption is that no language was used or intended to be used to injure plaintiff's reputation in his business or social standing, and this presumption must be overcome by proof."

"(4) The court instructs the jury that the liability of a corporation for oral slander uttered by its agents stands upon a different footing than written or published slander, the law ascribing them to the personal malice of the agent rather than to the act performed in the course of his employment and in the aid of the interest of his employers, and exonerating the company, unless it authorized, ratified or approved the act of the agent in uttering the particular slander complained of, or the agent was acting within the scope of his employment.

"(5) The court instructs the jury that although you may find from the evidence in the case that the language set out in the complaint was used by the agent or employee of the company, that such language, in its common acceptation, amounts to charging the plaintiff with a breach of the criminal law, or other dishonest practice, yet if you further find from the evidence that such language was spoken by the agent of the company to another in the course of his duty, and that it was necessary or

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proper in the course of the investigation for such communication to have been made, in the course of duty, and not with a malicious intent to injure the plaintiff, then the court tells you as a matter of law that this would be a privileged communication for which the agent nor the company would be liable, and your verdict would be for the defendant."

Appellant contends that the trial court committed an error in admitting evidence to prove that he was discharged for incivility. But the evidence was competent. He alleged in his complaint that immediately after the slanderous charge was made by the detectives against him, the defendant discharged him from its employment, in response to which allegation the defendant denied that he was discharged on account of the loss of the 14 bales of cotton, but said that his discharge was due solely to his insubordination to those in authority over him. He testified that he was discharged immediately after the alleged slanderous charges were made. The inference to be drawn from his testimony was that his discharge was based upon the charges. The testimony as to incivility was admissible to show the cause of his discharge, and that the defendant did not thereby ratify the charges of its agent.

Appellant complains of the refusal of the court to grant his request as to his reputation in the community in which he lived, of being an upright, honest man. It was properly refused. His reputation was not attacked and not involved in the issues in the case. *Townsend on Slander and Libel*, § 387.

Appellant says that "the first instruction given at the defendant's request was erroneous, in this: That the jury were thereby told that in order for plaintiff to recover 'it must further appear that the slander was uttered with a malicious intent on the part of the defendant company to injure the plaintiff in his business or social standing.'" In this connection the court first instructed the jury at the request of the plaintiff as follows: "While it is true that malicious intent is not to be presumed, but must be proven, this proof need not be in the form of direct testimony, but may be shown by circumstantial evidence. It is for the jury to say, after considering the language of defendant's agent complained of, together with all the circumstances attending its utterance, whether such slanderous words were or were not spoken with malice, either express or legal, as hereinbefore defined." which was as follows: "Malice as used in this instruction does not mean that the agent using the alleged slanderous words must have any personal spite, ill will or hatred of the plaintiff, but means if the defamatory words complained of were wrongfully used, and were used intentionally, without just cause or excuse, or in wanton and reckless disregard of the rights and feelings of the plaintiff, then, in the legal sense, they were maliciously used." The words objected to in defendant's instruction are fully explained in instructions given at plaintiff's

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request, and are in harmony with the same. The words objected to do not say how the malicious intent to injure must appear; that is shown by the instructions given at plaintiff's request. In that respect the jury were instructed as plaintiff requested, and he has no cause to complain.

The objection to instruction numbered 2, given at the request of the defendant, are the words "the presumption is that no language was used or intended to be used to injure plaintiff's reputation in his business or social standing, and this presumption must be overcome by proof." To the same effect the court instructed the jury at the request of plaintiff by saying "while it is true that malicious intent is not to be presumed, but must be proven." The plaintiff has no right to complain of the defendant or court repeating his own request for instructions.

The appellant objected to the instruction numbered 4, and given at the instance of the defendant, because a corporation could not, according to it, be held liable for a slander uttered by its agent, "unless it authorized, approved, or ratified the act of the agent in uttering the particular slander complained of, or the agent was acting within the scope of his employment." Is this a correct declaration of law? Slander is unlike other torts. It is the individual act of him who utters it, and often arises entirely out of his momentary feelings and passions, without forethought on the speaker's part. It is such an act as cannot be anticipated, and for that reason cannot be impliedly authorized in advance. Hence it has been held that the utterance of slanderous words by an agent of a corporation must be ascribed to the personal malice of the agent who uttered them, "rather than to the act performed in the course of his employment and in aid of the interest of his employer," and the corporation must be exonerated, "unless it authorized, approved or ratified the act of the agent in uttering the particular slander." Mere proof of agency will not be sufficient to prove such authority or ratification. *Singer Sewing Machine Co. v. Taylor*, 150 Ala. 574, 43 South. 210, 9 L. R. A. (N. S.) 929, 124 Am. St. Rep. 90; *Redditt v. Sewing Machine Co.*, 124 N. C. 100, 32 S. E. 392; *Sawyer v. Railroad*, 142 N. C. 1, 54 S. E. 793, 115 Am. St. Rep. 716; *Behre v. National Cash Register Co.*, 100 Ga. 213, 27 S. E. 986, 62 Am. St. Rep. 320; *Kane v. Boston Mutual Life Ins. Co.*, 200 Mass. 265, 86 N. E. 302; *State v. Railroad*, 23 N. J. Law, 360; *Dodge v. Bradstreet Co.*, 59 How. Prac. (N.Y.) 104; 18 Am. & Eng. Ency. Law (2d Ed.) 1059, 1063; 10 Cyc. 1216.

Appellant contends that instruction numbered 5, and given at the request of the defendant should not have been given, because there was no evidence to support it. We think the testimony of Parker was sufficient for that purpose.

Finding no reversible error in the proceedings of the court, its judgment is affirmed.

FLORIDA EAST COAST RY. CO. *v.* LASSITER.

(Supreme Court of Florida, June 11, 1910.)

[52 So. Rep. 975.]

Evidence—Opinion Evidence—Qualification of Expert.—Where a witness is called to testify as an expert or skilled witness upon a question pertaining to railroading, his qualifications are determined by considering the particular branch of the business in which he has been engaged, the length of time that he has served in a particular capacity, his opportunities for obtaining the requisite knowledge, skill, and experience, and the relationship between the branch of the service in which he has been engaged and the question upon which he is called to give testimony.

Trial—Reception of Evidence—Motion to Strike.—A motion to strike testimony is available only when the testimony admitted is inadmissible, irrelevant, or immaterial.

Master and Servant—Injuries to Servant—Evidence—Negligence—Customary Conduct—Operation of Railroad.*—The usual conduct of employees required or permitted by railroad companies in the ordinary operation of trains is not wholly inadmissible or irrelevant upon a question of the care and diligence required in the proper conduct of the business.

Master and Servant—Injuries to Servant—Contributory Negligence—Operation of Railroad.—Evidence that as a general custom it is usual for a switchman to ride on a car being switched when a duty is to be performed at the point of destination, and the car is going faster than a man usually walks, is not contrary to, but comports, with common knowledge, and the act is not obviously dangerous as to be manifestly inconsistent with safe railroad operation.

Master and Servant—Safe Appliances—Due Care in Providing—Evidence.—A mere showing that boys had access to the yard, and that mischievous persons have meddled with cars, is not relevant to an issue of due care in providing safe machinery and appliances.

Appeal and Error—Harmless Error—Admission of Evidence.—There was no reversible error in permitting a witness on cross-examination to state that the doctor who attended the plaintiff when he was injured was the defendant's local surgeon, as such testimony did not go to the question of the liability of the defendant, and the effect of the court's charge was to exclude injury to the defendant in increased damages on account of such testimony, even if the

*See generally, foot-note of *Bourassa v. Grand Trunk Ry. Co.* (N. H.), 34 R. R. R. 355, 57 Am. & Eng. R. Cas., N. S., 355; foot-note of *Anderson v. Louisville & N. R. Co.* (Ky.), 34 R. R. R. 220, 57 Am. & Eng. R. Cas., N. S., 220; last foot-note of *Campbell v. Duluth & N. E. R. Co.* (Minn.), 32 R. R. R. 490, 55 Am. & Eng. R. Cas., N. S., 490; second head-note of *Taylor v. Baltimore & O. R. Co.* (Va.), 31 R. R. R. 776, 54 Am. & Eng. R. Cas., N. S., 776.

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previous mention of the doctor and his attentions to the plaintiff did not justify the question on cross-examination.

Trial—Direction of Verdict.—Where the evidence is conflicting, it is not error to refuse an affirmative charge.

Master and Servant—Duty to Furnish Suitable Appliances—Duty to Warn of Defects.†—It is the duty of the master to exercise such ordinary and reasonable care as prudence and the exigencies of the situation require, in providing the servant with safe machinery and suitable instrumentalities for his work, and in notifying the servant of any defects or risks of which the servant does not know. If the duty is not performed the master is liable for injuries resulting proximately from such failure of duty.

Negligence—Question for Jury.—Where it cannot be said as matter of law that the plaintiff's negligence in part caused his own injury, the question of contributory negligence should be submitted to the jury.

Master and Servant—Choosing More Hazardous Method—Duty of Servant to Exercise Care.‡—If two or more ways or methods were open to the plaintiff in the performance of his duties as switchman, and he had no instructions to pursue one in particular, he necessarily must choose between them, and he cannot be held to have been negligent if he in good faith adopted that way or method which is more hazardous than another, provided the one pursued be one that reasonable and prudent persons would adopt under like circumstances, or provided the plaintiff was reasonably prudent in adopting the way or method used. In all cases the employee is bound to use ordinary care for his own protection.

Trial—Instructions—Error Cured by Other Instructions.—Charges that are not technically accurate will not cause a reversal where correct charges are given on the point and it appears that no injury could reasonably have resulted from the technical inaccuracy.

Appeal and Error—Review—Findings.—Where damages allowed are not clearly excessive, an appellate court will not disturb a finding sustained by the evidence.

Taylor, J., dissenting.

(Syllabus by the Court.)

In Banc. Error to Circuit Court, St. Lucie County; M. S. Jones, Judge.

†See second foot-note of *Siegel v. Detroit, etc., Ry. Co.* (Mich.), 35 R. R. R. 311, 58 Am. & Eng. R. Cas., N. S., 311; second foot-note of *Ryland v. Atlantic C. L. R. Co.* (Fla.), 35 R. R. R. 56, 58 Am. & Eng. R. Cas., N. S., 56; foot-note of *Hill v. Atchison, etc., Ry. Co.* (Kan.), 34 R. R. R. 672, 57 Am. & Eng. R. Cas., N. S., 672.

See extensive note, 35 R. R. R. 640, 58 Am. & Eng. R. Cas., N. S., 640.

‡See last foot-note of *Chicago, etc., Ry. Co. v. Murray* (Ark.), 29 R. R. R. 791, 52 Am. & Eng. R. Cas., N. S., 791; last foot-note of *Kath v. East St. Louis, etc., Ry. Co.* (Ill.), 28 R. R. R. 365, 51 Am. & Eng. R. Cas., N. S., 365.

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Action by Charles O. Lassiter against the Florida East Coast Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

George M. Robins, for plaintiff in error.

Beggs & Palmer, for defendant in error.

WHITFIELD, C. J. The defendant in error recovered judgment for damages against the railroad company for personal injuries received by the running of a train while acting as yard switchman. A former judgment was reversed. *Florida East Coast Ry. v. Lassiter*, 58 Fla. 234, 50 South. 428. A grab iron on a freight car broke while the plaintiff was holding on by it, and he fell under the car, which passed over his left foot crushing it.

The negligence alleged to have proximately caused the injury is that the railroad company "carelessly and negligently permitted one of the grab irons and its fastenings and appliances on said car to become defective and out of repairs." Pleas of not guilty, and that the alleged injury was caused by the negligence and improper conduct of the plaintiff, and not otherwise, were filed.

In view of the former decision in this cause and the finding of two juries the liability of the defendant railroad company should be regarded as established unless material errors of law were committed in submitting the issue of liability to the jury in the last trial.

The plaintiff produced a witness who testified as to whether in his opinion it was necessary for the plaintiff in the proper discharge of his duty to ride on the side of the car being switched by putting his foot in the stirrup and holding on, attached to the car for that purpose, instead of walking, when he was injured.

In order to qualify himself this witness testified that he had lived in Ft. Pierce, where the injury occurred, for 14 years, and was familiar with the switchyards of the defendant company at that point; that he had had 10 years' experience as a car inspector at Jacksonville, Palm Beach, and Ft. Pierce for the defendant; that he was familiar with the requirements of switchmen in the discharge of their duties, and was acquainted with the tracks and distances in the Ft. Pierce yard, including those where the injury occurred, and had known the yard for eight years; that he had done switching, but never under regular employment. The defendant objected to the witness on the ground that he had not qualified as an expert. Exception was taken to the overruling of the objection. In admitting the witness, the court did not err and did not violate the rule contended for by the railroad company, that "where a witness is called to testify as an expert upon a question pertaining to railroading, his qual-

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ifications are determined by considering the particular branch of the business in which he has been engaged, the length of time that he has served in a particular capacity, his opportunities for obtaining the requisite knowledge, skill and experience, and the relationship between the branch of the service in which he has been engaged, and the question upon which he is called to give testimony." 5 Ency. of Ev. 543. The witness here was a skilled witness and was qualified as such. See Atlantic Coast Line Ry. Co. v. Crosby, 53 Fla. 400, text 439, 43 South. 318, and citations therein.

The branch of railroad business in which the witness was engaged and the capacities in which he acted at different times and his opportunities and experience sufficiently qualify him as an expert or a skilled witness as to the necessity for a yard switchman to ride on the car being switched in the proper discharge of his duties as switchman under given circumstances.

This expert or skilled witness testified that the plaintiff by walking instead of riding on the car as he did could not have gotten to the desired point in switching the car on which he rode in time to properly discharge his duty, and in answer to a question said to ride "would have been the usual way." The defendant moved to strike the last answer, but the court denied the motion and an exception was noted. A motion to strike testimony is available only when the testimony admitted is inadmissible, irrelevant or immaterial.

The usual conduct of employees required or permitted by railroad companies in the ordinary operation of trains is not wholly inadmissible or irrelevant upon a question of the care and diligence required in the proper conduct of the business. Evidence that as a general custom it is usual for a switchman to ride on a car being switched when a duty is to be performed at the point of destination and the car is going faster than a man usually walks, is not contrary to but comports with common knowledge, and the act is not so obviously dangerous as to be manifestly inconsistent with safe railroad operation. The evidence was admissible under the circumstances here. See 29 Cyc. 609; Atlantic Coast Line Ry. v. Beazley, 54 Fla. 311, 45 South 761.

The inquiry being made was not how the accident occurred, for there were eyewitnesses to that; but whether the plaintiff was negligent in riding on the car that he was engaged in switching, instead of walking in the discharge of his duties.

A witness for the defendant testified that he and others had inspected the car a few hours before the injury, and the hand grab was in perfect condition; that, if the nut had been off the top bolt to the hand grab or grab iron, he would have observed it. It was then offered to prove by the witness that boys had access to the yard and "to show particular instances where they did such things," as to meddle with the cars. The proffered testi-

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mony was rejected unless it was confined to the particular car. A mere showing that boys had access to the yard and that mischievous persons had meddled with cars is not relevant to an issue of due care in providing safe machinery and appliances.

There was no reversible error in permitting a witness on cross-examination to state that the doctor who attended the plaintiff when he was injured was the defendant's local surgeon, as such testimony did not go to the question of the liability of the defendant, and the effect of the court's charge was to exclude injury to the defendant in increased damages on account of such testimony, even if the previous mention of the doctor and his attentions to the plaintiff did not justify the question on cross-examination.

As the facts in evidence did not conclusively show that negligence of the plaintiff was a proximate cause of the injury, the refusal to direct a verdict for the defendant was proper.

It is the duty of the master to exercise such ordinary and reasonable care as prudence and the exigencies of the situation require, in providing the servant with safe machinery and suitable instrumentalities for his work and in notifying the servant of any defects or risks of which the servant does not know. If this duty is not performed, the master is liable for injuries resulting proximately from such failure of duty. *German-American Lumber Co. v. Brock*, 55 Fla. 577, 46 South. 740.

It does not appear that Lassiter violated any law or any rule of his employer, or that he was actually negligent in riding on the side of the car by having a foot in the stirrup and holding on to the grab iron placed upon the car for the use of the switchmen and other such employees in mounting the car in the discharge of their duties; nor does it appear that such an act is apparently or specially hazardous or unusual or that the plaintiff knew of any defect in the car equipment or of any special hazard involved in his act. The law required of the plaintiff only the prudence of a prudent man, or ordinary prudence. It cannot be said as a matter of law that the act of riding on the side of the car as indicated was not the prudent act of an ordinarily prudent man, and that it was negligence under the circumstances of this case; therefore the question of contributory negligence was properly submitted to the jury. See *Kilpatrick v. Grand Trunk Ry. Co.*, 74 Vt. 288, 52 Atl. 531, 93 Am. St. Rep. 887; *Missouri, K. & T. Ry. Co. v. Hoskins*, 34 Tex. Civ. App. 627, 79 S. W. 369; *El Paso & S. W. Ry. Co. v. Vizard*, 39 Tex. Civ. App. 534, 88 S. W. 457.

It may not have been necessary for the plaintiff in the discharge of his duty to ride as he did, and it may be that he could have as conveniently or effectively discharged his duty by walking; yet he was not a trespasser, he was not forbidden to ride, and it seems that he at least had the privilege of so riding by

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using the means provided by the defendant and usual in such cases, and the plaintiff had the right to rely on the reasonable safety of the grab irons provided for use at any time convenient or proper, and not obviously dangerous in the employment engaged in. It does not clearly appear that the plaintiff did not exercise ordinary care in riding as he did, and there was evidence from which the jury could find that the defendant did not furnish reasonably safe means for use in rendering the service and that the defective grab iron was the proximate cause of the injury to the plaintiff. See *El Paso & S. W. Ry. Co. v. Vizard*, 211 U. S. 608, 29 Sup. Ct. 210, 53 L. Ed. 348, and authorities cited; 3 Elliott on Railroads, par. 1315d.

The refusal of the court to give the following instruction requested by the defendant was expected to and is assigned as error: "The boarding of a train in motion is necessarily attended with more or less danger under any circumstances, and employees of railroads owe it to their own safety to abstain from attempting it unless the demands of duty make it necessary." The amended declaration alleges that "while the plaintiff as switchman of defendant as aforesaid was engaged in shifting and placing the car aforesaid, he necessarily attempted to get upon said car by means of and by taking hold of the said defective grab iron." This is not clearly an allegation that in the proper discharge of his duty the plaintiff "necessarily attempted to get upon the said car," but it is an allegation that "he necessarily attempted to get upon said car by means of and by taking hold of the said defective iron." This being so, the necessity of riding was not expressly made an issue by the declaration.

The necessity of using the grab iron in riding is not controverted. No issue involved in the pleadings made the refusal to give the requested charge error, especially as it is merely abstract, and its substance was given in another charge in its proper application to the evidence.

If two or more ways or methods were open to the plaintiff in the performance of his duties as switchman, and he had no instructions to pursue one in particular, he necessarily must choose between them, and he cannot be held to have been negligent if he in good faith adopted that way or method which is more hazardous than another, provided the one pursued be one that reasonable and prudent persons would adopt under like circumstances, or provided the plaintiff was reasonably prudent in adopting the way or method used. In all cases the employee is bound to use ordinary care for his own protection. See *Florida Cent. & P. R. Co. v. Mooney*, 40 Fla. 17, 24 South. 148. This rule is not in conflict with the one approved and cited by the defendant, viz.: "If there are two ways of discharging the service apparent to the employee, one dangerous and the other less safe or dangerous, he must select the safe or less dangerous

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way; and cannot recover for an injury sustained when the danger is imminent, and so obvious that a careful and prudent man would not incur the risk under the same circumstances." *Mobile & O. R. Co. v. George*, 94 Ala. 199, 10 South. 145. It does not appear that there was obvious danger in riding, but from the evidence it may be inferred that the method pursued by the plaintiff was ordinarily and reasonably safe and proper to be used, and that the plaintiff was not at fault. See *Kiley v. Rutland R. Co.*, 80 Vt. 536, 68 Atl. 536, 68 Atl. 713, 13 Am. & Eng. Ann. Cas. 269. There is nothing in the testimony to indicate that the plaintiff in riding in the discharge of his duty as switchman selected an imprudent method of action, and it was not error to refuse a charge on his point.

The plaintiff was not injured in getting on the car, but fell when the grab iron gave way, after he had ridden a short distance. The defect in the appliance is not shown to have been so obvious as to charge the plaintiff with notice of it, and charges that a previous inspection of the car with reasonable care would relieve the defendant of liability were properly refused as that does not properly state the measure of defendant's duty. Abstract charges as to the duty of jurors were not erroneously refused in view of the very full charges given.

The giving of each of the following charges was excepted to and assigned and urged as error: (1) "If you believe from the evidence that the plaintiff properly and necessarily mounted the car, either to get to its destination in time to make signals for stopping it at the coal pit, or to husband his strength by riding, for the full performance of his day's work, and that he was injured as already charged, by the negligence of his fellow servants, then you will find for the plaintiff, and award his damages according to the manner I have already specially charged you. (2) On the other hand, if you believe that the plaintiff wantonly and unnecessarily mounted when he might just as well have walked beyond the coal pit to make signals, or that he could by reasonable vigilance have seen that the nut was off the grab-iron bolt, and have avoided the danger of mounting by the help of it, then you will find for the defendant." The first of these two charges was objected to because of the use of the phrase "or to husband his strength by riding for the full performance of his day's work." This language may be objectionable because argumentative, and there may be no particular evidence as a basis for it, but, taken in connection with other portions of the charges given, it does not appear that it could reasonably have injured the defendant. The use of the word "wantonly" in the above charge is urged to be error because it "was equivalent to saying that unless the plaintiff was guilty of gross negligence in mounting the car he could recover," and was calculated to mislead the jury. While the word is not technically a cor-

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rect one to use in expressing the law on the subject, yet the plaintiff could not recover under the circumstances as stated in the charge where the word appears, and the defendant was not injured.

The charge, in effect is that if the plaintiff wantonly rode on the car he cannot recover, not that unless he wantonly rode on the car he may recover.

A technically inaccurate charge will not cause a reversal of a judgment where correct charges are given on the point and it appears that no injury could reasonably have resulted from the technical inaccuracy. See *Mitchell v. State*, 43 Fla. 584, 31 South. 242; *Louisville & N. R. Co. v. Willis*, 58 Fla. 307, 51 South. 134.

The use of the word "wantonly" in the quoted charge was technically incorrect, but several proper charges on the same point were given by the court, and the entire record clearly indicates that no injury could reasonably have resulted to the plaintiff in error from the giving of the technically inaccurate charge. The charge therefore is harmless in this case. *Johnston v. State*, 29 Fla. 558, 10 South. 698; *Keech v. Enriquez*, 28 Fla. 597, 10 South. 91.

The court several times instructed the jury that if they found the plaintiff was negligent or in any appreciable degree contributed to the injury he could not recover, and specifically that:

"(6) You are called upon to decide from the evidence, whether it was necessary for the plaintiff, under all the circumstances, to board the car from which he fell in order to discharge his duty properly; or whether he could have performed his duty as well by remaining on the ground. If you decide that there was no occasion for him to mount the moving car, but that he did so for his own convenience, then he assumed the risk himself, and he cannot recover in this suit, even though the injury he suffered was due to the negligence of a fellow servant of the company."

"(8) Where recovery is sought against a railroad company for injuries received as a consequence of the negligence of another employee of the company, the one injured must have done nothing negligently to contribute to his injury, and must have neglected to do nothing to prevent the consequences of the negligence of the other employee."

"(10) It is for you to determine whether, under the circumstances of this case, the plaintiff, by his conduct, contributed in an appreciable degree to the cause of the injury he suffered, and if you find from the evidence that there was negligence on his part that contributed to his injury, your verdict should be for the defendant."

These instructions with others given rendered the requested charges unnecessary for a full and fair consideration of the

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case. The question of the liability of the defendant appears to have been fairly presented to the jury, and there is ample evidence to justify the finding of liability. The court refused to give the following charge: "If you believe from the evidence that the operation performed on the plaintiff's foot by Dr. Worley on May 13, 1906—the one, I mean, where the plaintiff says the cushion was cut off—if you should believe that this operation was not the best that could have been done, or that it was made necessary by Dr. Lloyd's previous treatment, and that any disability has resulted therefrom that could have been avoided if the wound had had proper treatment in the first instance, you cannot hold the defendant railroad company responsible therefor, or award any damages against it on that account."

This refusal was not reversible error since the court at the defendant's request charged as follows:

"(1) The plaintiff has failed to produce to you evidence upon which a recovery might be had upon the second count in his declaration. This count was for damages said to have resulted from the improper treatment of plaintiff's foot by Dr. Lloyd. Whatever may have been Dr. Lloyd's treatment and the injuries resulting from it, as shown by the evidence, Dr. Lloyd alone is answerable for. You cannot give damages against the defendant railroad company on that account.

"(2) If you find from the evidence that there was improper treatment of plaintiff's foot by Dr. Lloyd, and that this enhanced his injury, and has increased his disability, you cannot award damages against the defendant railroad company for the entire injury and disability, but must make a proper allowance for that part of the damage which you attribute, under the evidence, to the treatment of the wound by Dr. Lloyd. And the same is true as to pain and suffering; a proper deduction should be made for that part of it, if any, that you find from the evidence was due to Dr. Lloyd's treatment of the wound.

"(3) If you should find from the evidence that the plaintiff is entitled to recover and that his earning capacity for the rest of his expectancy of life has been lessened, you should also determine to what extent the evidence shows that this is due to the injury received by the crushing of the foot by the car wheel and how much, if any, is due to the manner in which the foot was treated by the physician Dr. Lloyd; and having ascertained the injury due to such diminished earning capacity, and made proper allowances for that attributable to the treatment of the injury by Dr. Lloyd, you should reduce the residue to its present value, and such present value thereof only should be included in your verdict."

It is urged that the rules for the admeasurement of compensa-

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tory damages in a case like this were not correctly applied by the jury, and that the verdict for \$7,458 damages is excessive.

It was for the jury to determine from the evidence whether the plaintiff was at fault or negligent in the manner in which he rode on the side of the car, and this consideration goes to the question of liability and not to the amount of recovery, since the statutory rule of comparative negligence does not apply to employees. Even if the unskilled treatment of the wound by one or more of the physicians caused successive operations and a part of the permanent injury, the accident itself caused the loss of the front part of the foot and attendant suffering, loss of time, diminished earning capacity, etc., as shown by the testimony, and it cannot be held on this record that the jury were not governed by the evidence in fixing the damages or that the amount is so unreasonable and unjust as to warrant a reversal here.

The judgment is affirmed.

CLOUD v. ARCHISON, T. & S. F. Ry. Co.

(Supreme Court of Kansas, June 11, 1910.)

[109 Pac. Rep. 400.]

Master and Servant—Death of Servant—Evidence of Cause.—Evidence in an action for death of a locomotive engineer, received while in defendant's employ held sufficient to authorize a finding that, while leaning out of his cab window taking a signal from his conductor, in the line of his duty, his head collided with a girder of a bridge, in too close proximity to which defendant had negligently placed on the track.

Master and Servant—Assumption of Risk.*—A locomotive engineer cannot be held to have assumed the risk of danger from leaning out of his cab window to take signals from his conductor, at a bridge, within a few inches of a girder of which a large engine, moving rapidly and tipping and swaying considerably from side to side, will come; different sizes and types of engines being used on the road, some of which tip and sway more than others, and it being difficult to determine the distance between swaying locomotives and the side of the bridge.

Appeal from District Court, Lyon County; F. A. Meckel, Judge.

Action by Clara M. Cloud against the Atchison, Topeka &

*See foot-note of *Louisville & N. R. Co. v. Hahn's Adm'r* (Ky.), 33 R. R. R. 603, 56 Am. & Eng. R. Cas., N. S., 603.

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Santa Fe Railway Company. Judgment for plaintiff. Defendant appeals. Affirmed.

Wm. R. Smith, O. J. Wood, A. A. Scott, and Wm. Osmond, for appellant.

Kellogg & Huggins and C. M. Kellogg, for appellee.

PER CURIAM. Action by the widow of Thomas Cloud to recover damages from the railway company for the injury and death of her husband caused by the negligence of the railway company. It is alleged that, while serving as engineer and leaning out of a moving locomotive to obtain a signal from the rear of the train, his head collided with a girder of a narrow bridge and he was killed. She recovered a judgment against the company, and it is insisted that a demurrer to the evidence should have been sustained. We think the evidence is sufficient to sustain the verdict and judgment. It shows that the bridge was narrow, and that the track had been laid too close to the upright part of the bridge. It was built when a single track was used, and since the double tracks were laid a locomotive of the size of the one on which Cloud was riding when he was killed came within about 23 inches of the upright part of the bridge when the locomotive was erect and standing still. When moving rapidly, the locomotive tipped and swayed from side to side, so that it came within a few inches of the girder of the bridge. There is a station about 500 feet west of the bridge, and, as the train approached at the rate of 30 miles an hour, Cloud whistled to the conductor for a signal. The conductor directed the brakeman to give him the "high sign." That signal was given to the head brakeman, and he, in turn, passed it on to the engineer who was leaning out of the cab looking for it. Two blasts of the whistle were sounded, indicating that he had received it. About that time he was knocked down and killed. The jury found that the company was negligent in constructing the track too close to the sides of the bridge for the safety of engineers who took signals as Cloud had to do at that place, also in using so large an engine on that track, and in not keeping the track approaching the bridge in proper repair. There is proof enough that there was negligence in placing the track so close to the girders of the bridge where it was necessary for the engineer to lean out in order to get signals. Although no one saw the girders of the bridge strike Cloud's head, the testimony justifies the inference that he was taking the signal in the line of duty at the time he was struck. The fireman saw him leaning out, holding to the whistle rope and looking back for a signal, and heard the whistles and in a few moments looked again and saw the injured engineer lying in the bottom of the cab. Taking account of the distance from the whistling board to the bridge, the rate of speed the train was moving, and the time required to transmit

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the signals, it may be fairly inferred that he was receiving the signals when he reached the bridge and collided with it. It is said that he assumed the risk of the danger. Different types and sizes of engines are used on the railroad. Some tilt and sway more than others. In view of the difficulty in determining the distance between swaying locomotives and the side of the bridge and of all the other facts in the case, it cannot be held that there was an assumption of risk. *St. L., Ft. S. & W. R. Co. v. Irwin*, 37 Kan. 701, 16 Pac. 146, 1 Am. St. Rep. 266; *A., T. & S. F. R. Co. v. Rowan*, 55 Kan. 270, 39 Pac. 1010; *Railway Co. v. Michaels*, 57 Kan. 474, 46 Pac. 938; *Hoffmeier v. Railway Co.*, 68 Kan. 831, 75 Pac. 1117; *Smith v. Railway Co.*, 82 Kan. 136, 107 Pac. 635.

We find nothing substantial in the objections to the instructions nor in the other objections that have been made.

Judgment affirmed.

POTOMAC, F. & P. R. Co. v. CHICHESTER.

(Supreme Court of Appeals of Virginia, June 15, 1910.)

[68 S. E. Rep. 404.]

Master and Servant—Safety of Place of Work—Employer's Duty.*

—An employer must use ordinary care to provide a reasonably safe place of work for his employees, considering the character of the work, and is liable for injuries resulting from failure to use such care; but he may choose any reasonably safe method, being not required to adopt the newest and the best.

Master and Servant—Railroads—Safety of Place of Work—Switches and Y's.—As affecting the safety of employees, the location of a railway siding or switch for freight purposes, as to its curves and grades, is ordinarily an engineering question, which the company is entitled to settle for itself.

Master and Servant—Railroads—Safety of Place of Work—Y's.—As affecting a railway company's liability for the death of a brakeman, who was unable to stop a car he was handling on a Y by gravity, the Y was not negligently constructed, though the curves at one point were so sharp that locomotives could not run over it, and the grades were heavy, where the Y had been so maintained for 15 years without injury to any one.

*See second foot-note of *Thomas v. Wisconsin Cent. Ry. Co.* (Minn.), 33 R. R. R. 609, 56 Am. & Eng. R. Cas., N. S., 609; first head-note of *St. Louis S. W. Ry. Co. v. Lewis* (Ark.), 33 R. R. R. 618, 56 Am. & Eng. R. Cas., N. S., 618; second foot-note of *Vailancourt v. Grand Trunk Ry. Co.* (Vt.), 33 R. R. R. 353, 56 Am. & Eng. R. Cas., N. S., 353.

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Master and Servant—Railroads—Constitutional and Statutory Provisions—Effect.—Const. 1902, § 162 (Code 1904, p. cclix), and Code 1904, § 1294k, providing that a railway employee's knowledge of defects in appliances shall not bar recovery for injury caused by them, does not prevent a railway company from adopting any reasonably safe methods in conducting its business or constructing its switches, nor do they change the rule that any risk due merely to the character of a switch is one of the risks of employment.

Master and Servant—Railroads—Negligence—Handling Cars on Y.—A railway company was not negligent in handling its cars on a switch by gravity, where that method was reasonably safe, and had been used for many years without injury.

Master and Servant—Railroads—Death of Brakeman—Negligence—Jury Question.—In an action against a railway company for the death of a brakeman while moving a freight car by gravity, held, under the evidence, a jury question whether the car was dangerously overloaded.

Witnesses—Competency—Interest.—A witness' credibility, but not his competency, is affected by the fact that he has received more than his services are worth, and is to receive an additional sum on one of the parties succeeding.

Evidence—Expert Testimony—Admissibility.—In a personal injury case against a railway company, testimony of a witness that one link in a chain was longer than others was not incompetent because witness had little knowledge upon some matters to which he testified.

Trial—Evidence—Motion to Strike.—Evidence will not be stricken on a general motion, where part of it is admissible.

Appeal from Circuit Court, Orange County.

Action by one Chichester, administrator, against the Potomac, Fredericksburg & Piedmont Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

St. Geo. R. Fitzhugh, for plaintiff in error.

E. H. De Jarnett, Jr., for defendant in error.

BUCHANAN, J. This is an action to recover damages from the Potomac, Fredericksburg & Piedmont Railroad Company for the death of Charles S. Waller, an employee of the defendant company, caused by its alleged negligence.

The grounds of negligence relied on for a recovery are in substance: (1) That the switch or Y upon which the accident occurred was not properly constructed as to its grades or curves; (2) that the method adopted for handling the cars upon the switch or Y was dangerous; (3) that the brake on the car from which the plaintiff's intestate fell or was thrown was out of repair; and (4) that the said car was overloaded.

The defendant company operated a narrow gauge railroad be-

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tween Fredericksburg and Orange courthouse. At Tinder's, one of its stations on the road, there was a switch in the shape of a Y. On the east leg of this Y freight cars were loaded with timber and lumber and brought down to or near the main track by hand. In February, 1908, there was standing on the east leg of the Y one of the defendant company's cars loaded with lumber. Upon the arrival of one of its trains at that station, the conductor directed the plaintiff's intestate and another brakeman to bring the car down towards the main track, so that it could be attached to the train and carried to Fredericksburg. Both of the brakemen ran toward the car; but the plaintiff's intestate reached it first, boarded it, released the brakes, and started it down the grade. After the car had run a short distance, he applied or attempted to apply the brakes; but, finding that the speed of the car was not much checked, in a further effort to apply the brakes, or in the act of jumping off to avoid a collision with another car a short distance below (it does not clearly appear which), he slipped and fell in front of, and was run over by, the car (No. 12), which caused his death.

The most material matter involved in the case, and one of much importance, is as to the action of the court in submitting to the jury the question whether or not the switch or Y, as to its grades and curves, was properly constructed. It is not contended that the switch or Y was out of repair, but that the manner in which it was constructed and operated rendered it unsafe and dangerous.

The curves in the east leg of the Y, where the cars were brought down by hand, or by gravity, were sharp, so much so that the engines then in use upon the road could not run over it to the point where car No. 12 was loaded and standing. The grades upon this part of the Y were heavy—at some points between 4 and 5 per cent. This had been substantially the condition of the east leg of the Y for more than 15 years. During that time cars had been brought down by hand almost every day, or at least several times a week, and frequently two or three at one time, by one brakeman, without personal injury to any one, though on several occasions those in charge of such cars had lost control of them, or were unable to prevent them from running against or into other cars standing on the Y. The evidence shows that the Y could have been constructed with curves less sharp and grades less heavy, and that plans for a new Y had been made by the defendant's engineer some 6 or 7 years before, and the west leg of the Y rebuilt according to that plan.

It is a general principle of law that the master shall use ordinary care to provide a reasonably safe place in which his servant is to work, considering the character of the work in which the servant is engaged, and the master will be held liable for injuries to the servant which result from failure to exercise such

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care. But the right of selection among reasonably safe methods for doing his work rests with the master. He is not required to adopt the newest and the best, but he performs his duty if he adopts those which are reasonably safe. *N. & P. Traction Co. v. Ellington's Adm'r*, 108 Va. 245, 249, 250, 61 S. E. 779, 17 L. R. A. (N. S.) 117, and cases cited.

The general rule seems to be that the location of a siding or switch for freight purposes, as to its curves and grades, is ordinarily an engineering question, which a railway company is entitled to settle for itself.

In the case of *Tuttle's Adm'r v. Detroit, etc., Ry. Co.*, 122 U. S. 189, 7 Sup. Ct. 1166, 30 L. Ed. 1114, one of the grounds of negligence relied on for recovery was that the railway company in the construction of a "boot-jack" siding, negligently and unskillfully constructed the same with so sharp a curve that the drawheads of the cars failed to meet and passed each other, thereby causing the death of the plaintiff's intestate while coupling the cars. In discussing that ground of alleged negligence, the court said: "We have carefully read the evidence presented by the bill of exceptions, and, although it appears that the curve was a very sharp one at the place where the accident happened, yet we do not think that public policy requires the courts to lay down any rule of law to restrict a railroad company as to the curves it shall use in its freight depots and yards, where the safety of passengers and the public is not involved, much less that it should be left to the varying and uncertain opinions of juries to determine such an engineering problem. * * * The interest of railroad companies themselves is so strongly in favor of easy curves as a means of facilitating the movements of their cars that it may well be left to the discretion of their officers and engineers in what manner to construct them for the proper transaction of their business in yards, etc. It must be a very extraordinary case, indeed, in which their discretion in this matter should be interfered with in determining their obligation to their employees."

The rule of law announced by the Supreme Court of the United States in that case was approved by this court in *N. & W. Ry. Co. v. Cromer*, 101 Va. 667, 671, 44 S. E. 898. In that case it was said: "Courts and juries cannot dictate to railway companies a choice between methods, all of which are shown to be reasonably adequate for the purposes intended to be subserved. Thus to subject them to the varying and uncertain opinions of juries in questions of policy, and to substitute the discretion of the latter for their discretion, would be wholly impracticable, and would prove alike disastrous to the public and the companies." See, also, generally, *Boyd v. Harris*, 176 Pa. 484, 35 Atl. 222, 223; *C. & E., etc., R. Co. v. Driscoll*, 176 Ill. 330, 52 N. E. 921-923; *Bethlehem Iron Co. v. Weiss*, 100 Fed.

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45, 40 C. C. A. 270; *Gilbert v. Burlington, etc., Ry. Co.*, 128 Fed. 529, 63 C. C. A. 27.

We are of opinion, therefore, under the facts of this case, that the court erred in submitting to the jury the question whether or not the defendant company was negligent in the method it had adopted for constructing the switch upon which the injury occurred.

The constitutional and statutory provisions (Const. 1902, § 162 [Code 1904, p. cclix]; Va. Code 1904, § 1294k) do not affect this question. The effect of those provisions was not to take away from the railroad company the right to carry on its business in its own way and to adopt any method of constructing its switches it might prefer, which were reasonably safe; nor do they change the rule that any risk was due merely to the character of the switch was one of the risks of the employment. The effect of those provisions, as was held in *Cheatwood's Case*, 103 Va. 356, 49 S. E. 489, was merely to abrogate the previously existing rule, which forbade the servant's recovery if he knowingly used defective machinery, etc., and to declare that such knowledge, of itself, should not bar a recovery.

We are of opinion also, that the court erred in submitting to the jury the question whether or not the defendant was negligent in the method of handling cars on the switch. That method was proved to be reasonably safe, and had been used for many years without personal injury to any one, and was in common use.

"Absolute safety," as was said by the court in *Norfolk, etc., Co. v. Ellington's Adm'r*, *supra*, "is unattainable, and employers are not insurers. They are liable for the consequences, not of danger, but of negligence, and the unbending test of negligence in methods, machinery, and appliances is the ordinary usage of the business. * * * The test of negligence in the employer is the same, and however strongly they may be convinced that there is a better or less dangerous way, no jury can be permitted to say that the usual and ordinary way commonly adopted by those in the same business is a negligent way for which liability shall be imposed. Juries must necessarily determine the responsibility of individual conduct; but they cannot be allowed to set a standard which shall in effect dictate the customs or control the business of the community.

There was no error in the action of the court in submitting to the jury, as was done in plaintiff's instruction No. 9, the question whether or not the car No. 12 was dangerously overloaded, or its brakes were defective, and, if so, whether or not such dangerous overloading or defective condition of the brakes was the proximate cause of the death of plaintiff's intestate. There was evidence tending to prove that the car was overloaded with the knowledge and consent of the defendant company, and that the brakes were in a defective condition.

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Another error assigned is to the action of the court in refusing to exclude the evidence of Cave Anderson, one of the plaintiff's witnesses, on the ground that the witness had acknowledged that he had been paid \$10 by the plaintiff's attorney to make a trip to Fredericksburg to examine the condition of the brakes of the car which ran over the plaintiff's intestate, and was to receive \$30 more if the plaintiff made a recovery in the case.

The fact that the witness had received more than his services were worth, and was to receive an additional sum in the event the plaintiff was successful, went to the witness' credibility, and not to his competency.

The court refused to exclude the evidence of Shannon, another witness of the plaintiff, because his answers to questions asked him showed that "he was a perfect ignoramus as far as any knowledge of the brake machinery" on the car was concerned.

Although the witness upon some matters as to which he testified seems to have had little knowledge, he testified positively and clearly that one link in the brake chain was longer than the others. This was competent evidence tending to sustain the plaintiff's contention as to the condition of the brake chain, and was admissible. The motion to strike out was properly overruled.

Where evidence is offered, a portion of which is admissible and the other not, and the objection to it is general, the motion to strike out must be overruled. *Washington, etc., Ry. Co. v. Lacey*, 94 Va. 460-463, 26 S. E. 834.

Other errors are assigned; but it will be unnecessary to notice them in detail, as they are not likely to arise upon the next trial, or are controlled by what has been said in disposing of the errors particularly considered.

The judgment complained of must be reversed, the verdict set aside, and the cause remanded for a new trial, to be had not in conflict with the views expressed in this opinion.

JOHNSON *v.* GREAT NORTHERN RY. CO.

(Circuit Court of Appeals, Eighth Circuit, March 14, 1910.)

[178 Fed. Rep. 643.]

Commerce—Regulation of Interstate Roads—Safety Appliance Act.—The safety appliance act (Act March 2, 1893, c. 196, § 2, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174]) imposes upon a railroad company engaged in interstate commerce the absolute duty of seeing that all cars used in such commerce that are moved by it are, when so moved, equipped with a coupling device in such condition that it will couple automatically by impact, and so constructed that it can be uncoupled from an adjoining car without the necessity of the person uncoupling going between the cars.

Commerce—Safety Appliance Act—Cars Used in Interstate Commerce.*—A foreign freight car, moved by one railroad company from one state into another, loaded, and there delivered to defendant company, and by defendant to the consignee, and after being unloaded and placed by defendant on a switch track, from which it was afterwards redelivered to the original company, again loaded by it, and returned into the state whence it came, was, when on defendant's switch track awaiting redelivery, a car in use in interstate commerce, and subject to the requirement of the safety appliance act (Act March 2, 1893, c. 196, § 2, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174]), as to equipment with automatic coupling devices in such condition as to be operative, and its movement on such track by defendant, when so defective that it would not couple by impact, was a violation of such act.

Master and Servant—Federal Employer's Liability Act—Injury of Railroad Employee—Movement of Defective Car.—Under the employer's liability act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. Supp. 1909, p. 1172]), where a railroad company moved a car being used in interstate commerce having a coupler so defective that it would not couple automatically by impact, as required by Act March 2, 1893, c. 196, § 2, 27 Stat. 531 (U. S. Comp. St. 1901, p. 3174), and an employee, while attempting to remedy the defect in the performance of his duty, was caught between the cars and injured, the violation of the statute by the company was a contributing cause of the injury, which rendered it liable therefor; the questions of assumption of risk and contributory negligence being immaterial, under sections 3 and 4 of the act.

Master and Servant—Federal Employer's Liability Act—Servant Employed in Interstate Commerce.—An employee of a railroad com-

*For the authorities in this series on the question whether or not cars are being, or were used in carrying on interstate commerce, see first foot-note of *Chicago, etc., Ry. Co. v. United States* (C. C. A.), 33 R. R. R. 83, 56 Am. & Eng. R. Cas., N. S., 83; *Southern Flour & Grain Co. v. Northern Pac. Ry. Co.* (Ga.), 23 R. R. R. 529, 46 Am. & Eng. R. Cas., N. S., 529.

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pany, charged with the duty of seeing to the coupling of the cars and of the air brake pipes upon cars standing upon a switch track to be transferred to another company, some of which cars were being used in interstate commerce, was being employed in interstate commerce, and was within the provisions of the employer's liability act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. Supp. 1909, p. 1172]).

Sanborn, Circuit Judge, dissenting.

In Error to the Circuit Court of the United States for the District of Minnesota.

Action by Gust Johnson against the Great Northern Railway Company. Judgment for defendant, and plaintiff brings error. Reversed.

Humphrey Barton (*John H. Kay*, on the brief), for plaintiff in error.

M. L. Countryman, for defendant in error.

Before SANBORN, Circuit Judge, and RINER and WM. H. MUNGER, District Judges.

WM. H. MUNGER, District Judge. This action was to recover for injuries sustained by plaintiff while in the employ of the defendant. Plaintiff had been in the employ of defendant for about 2½ years as a car repairer, upon tracks in defendant's railroad yards in the city of Minneapolis, Minn.; such tracks having been set apart for repair work only. About five weeks prior to the injury complained of, plaintiff was sent to another one of defendant's yards in said city and assigned to the work of coupling up air hose, looking over brakes to see if they were all right, and to shop-mark any brake that was found broken. On the date of the injury an employee of defendant by the name of Burns, whose work was to couple up the air hose and make such light repairs as could be done upon the switching track, was unable to perform his work that day, and plaintiff was assigned and directed by the foreman to do Burns' work. The tracks upon which this work was done were not repair tracks, but were switching tracks; track 23 being a track upon which the cars were switched which were to be delivered to the Soo Railroad Company. The first work that plaintiff did on the day of the accident was to couple up the air in a string of about 40 cars standing upon said track 23. In going along the string of cars, coupling up the air, he came to a place where the cars were not coupled together. The knuckles of the couplers were open, but so close together that he was able to couple up the air hose. He noticed nothing wrong with the couplers at that time, and supposed they would couple when they came together. He went to another track, did some work, came back to track 23 to see if

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there had been more cars put on it, and then saw that the two cars before mentioned had not been coupled together, but had separated some, and the air hose had become uncoupled. He tried the lever on one of the cars to raise the pin, and it would not raise. He then went between the cars and found the lock pin down and slightly bent. He stepped out and looked to see if there was any engine about the track. Not noticing any, he stepped again in between the cars and tried to work the pin up with his hands, when the cars came together and caught and injured him. The cars came together by reason of other cars being kicked in on that track while he was endeavoring to work the pin out. In his petition he based his right to recover upon the grounds, first, that the car in question was used in interstate commerce, and was moved by defendant as an interstate commerce car, while it had a defective coupler, which would not couple to the adjoining car automatically by impact; and, second, in moving said car without giving any notice or warning to the plaintiff of the intention to move said car. At the close of the evidence, the court, over plaintiff's objection, directed a verdict for the defendant.

The real question in controversy is whether the facts stated bring the case within the act of Congress of date March 2, 1893 (27 Stat. 531, c. 196 [U. S. Comp. St. 1901, p. 3174]), known as the "Safety Appliance Act." The act in question imposed upon railroad companies engaged in interstate commerce the absolute duty of seeing that all cars engaged in such commerce, that were moved by it, should be, when so moved, equipped with a coupling device in such condition that it would couple automatically by impact, and so constructed it that it could be uncoupled from an adjoining car without the necessity of the party uncoupling going between the cars for such purpose. *St. Louis & Iron Mountain Ry. Co. v. Taylor*, 210 U. S. 281, 28 Sup. Ct. 616, 52 L. Ed. 1061; *U. S. v. Atchison, T. & S. F. Ry. Co.*, 163 Fed. 517, 90 C. C. A. 327; *Chicago Junction Ry. Co. v. King*, 169 Fed. 372, 94 C. C. A. 652.

In *St. Louis & Iron Mountain Ry. Co. v. Taylor*, *supra*, it was said:

"In the case before us the liability of the defendant does not grow out of the common-law duty of master to servant. The Congress, not satisfied with the common-law duty and its resulting liability, has prescribed and defined the duty by statute. We have nothing to do but to ascertain and declare the meaning of a few simple words in which the duty is described. It is enacted that 'no cars, either loaded or unloaded, shall be used in interstate traffic which do not comply with the standard.' There is no escape from the meaning of these words. Explanation cannot clarify them, and ought not to be employed to confuse them or lessen their significance. The obvious purpose of the Legis-

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lature was to supplant the qualified duty of the common law with an absolute duty deemed by it more just. If the railroad does, in point of fact, use cars which do not comply with the standard, it violates the plain prohibitions of the law, and there arises from that violation the liability to make compensation to one who is injured by it. It is urged that this is a harsh construction. To this we reply that, if it be the true construction, its harshness is no concern of the courts. They have no duty except to enforce the law as it is written, unless it is clearly beyond the constitutional power of the lawmaking body."

The car in question, having the defective coupler, was a car belonging to the Wabash Railroad Company, and known and designated as a "foreign" car. It had been brought into Minneapolis, Minn., from the state of Wisconsin, by the Soo Railroad, delivered to the defendant loaded with coal, and by the defendant delivered to the consignee. It had been unloaded and placed upon track 23 for the purpose of being redelivered to the Soo Railroad. It was delivered to that railroad, and afterwards loaded with shingles in Minnesota, and taken by the Soo road thus loaded into Wisconsin on its return home. That it was at the time a car in use in interstate commerce is clearly sustained by the decision of the Supreme Court, in *Johnson v. Southern Pacific Co.*, 196 U. S. 1, 25 Sup. Ct. 158, 49 L. Ed. 363, in which case it said:

"Whether cars are empty or loaded, the danger to employees is practically the same, and we agree with the observation of District Judge Shiras, in *Voelker v. Railway Co.* [C. C.] 116 Fed. 867, that 'it cannot be true that on the eastern trip the provisions of the act of Congress would be binding upon the company, because the cars were loaded, but would not be binding upon the return trip, because the cars are empty.'"

The use of the car in question, at the time of the injury, was a use in interstate commerce within the rule thus announced. It had been brought loaded from the state of Wisconsin into the state of Minnesota, and though empty at the time of the injury was being moved by the defendant on its return from whence it came. That the switching movement made at the time of the injury was a movement within the purview of the act of Congress is clearly established by the case of *Voelker v. Chicago, M. & St. P. Ry. Co.* (C. C.) 116 Fed. 867, and same case, 129 Fed. 522, 65 C. C. A. 226, 70 L. R. A. 264. In that case the coupler had become defective, so that when the knuckle thereof was closed it was necessary for some one to go between the cars to open it, so as to prepare the coupler for the impact. Voelker was injured while in the performance of that act; the cars coming together by reason of other cars being moved onto the same track. The only difference in the facts between that case and this, which can be said to be at all material, is the fact

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that in that case Voelker was a brakeman, employed in the movement of the train; in this case, plaintiff, while not a brakeman, was engaged in the duty of seeing that the cars placed upon this track, and the air hose, were coupled. It is true that in addition to this duty he made light repairs, which could be done without the cars being placed upon the repair track. When injured he was not engaged in repairing the car, but was attempting to remove the bent pin so that the cars would couple by impact. He was performing practically the same thing which Voelker was performing in the case referred to.

The facts of this case are quite similar, also, to those of the case of *Chicago Junction R. Company v. King*, supra. In that case King was in the employ of defendant as a switchman in its yards, and while repairing a coupler was injured by the cars coming together. It was contended that the movement of the car was not such as was covered by the act; also that plaintiff, in doing the work of repairing a coupler, was not within the protection of the act, the coupler provisions being designed only for those who are engaged in the work of coupling and uncoupling cars. The Court of Appeals, in holding otherwise, said:

"But we find nothing in the statute that limits the classes of persons to whom carriers shall be responsible for damages that result directly and immediately from its illegal doings."

We think the proper construction of the act is applicable to all servants of the carrier who are injured while acting in the performance of their duty in and about the operation of the cars, where the proximate cause of the injury is the movement of a car in interstate commerce, with a defective coupler.

The prohibition against the defendant moving a car in interstate commerce not properly equipped with a coupler, which could be uncoupled without the necessity of a party going between the ends of the cars, being a positive one, the question as to whether or not defendant was negligent in moving the car, as measured by the common law of negligence in not giving warning to plaintiff of such movement, is wholly immaterial. Nor do we think any question of contributory negligence or assumed risk upon the part of plaintiff material in the determination of the case before us. *Schlemmer v. Buffalo Rochester & C. Ry.*, 205 U. S. 1, 27 Sup. Ct. 407, 51 L. Ed. 681. By section 8 of the safety appliance act it is provided:

"That any employee of any such common carrier, who may be injured by any locomotive car or train in use contrary to the provisions of this act, shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of such carrier after the unlawful use of such locomotive car had been brought to his knowledge."

Again, we think the facts bring the case within the provisions

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of Act Cong. April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. Supp. 1909, p. 1172), known as the "Employer's Liability Act," as the defendant, in moving the car in question, was engaged in interstate commerce, plaintiff was employed by such carrier in said commerce, and the proximate cause of the injury was the defective condition of the coupling pin. By that act the question of contributory negligence, when applicable, is one of fact, to be submitted to the jury. The act also provides:

"That no employee, who may be injured or killed, shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees, contributed to the injury or death of such employee."

Section 4 of that act provides:

"That in any action brought against any common carrier under and by virtue of any of the provisions of this act, to recover damages for injuries to or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees, contributed to the injury or death of such employee."

It is argued that the employer's liability act can have no application to the case, as plaintiff was not an employee engaged in interstate commerce. A part of his employment was to see to the coupling of the cars and the air hose upon the cars which were placed upon the transfer tracks. Some of those cars, among them the one in question, were engaged in interstate commerce. It is difficult to see why he was not an employee engaged in the movement of interstate commerce to as full an extent as a switchman engaged in the making up of trains in the railroad yards, as in the case of *Chicago Junction R. Co. v. King*, *supra*.

From a consideration of the whole case, we think the defendant a railroad company engaged in interstate commerce; that the car in question had upon it a coupler which was defective and did not comply with the act of Congress; that at the time plaintiff was injured the movement of the car was a movement by defendant in interstate commerce; that plaintiff was injured while a servant of defendant and in the performance of his duty, aiding in the movement of interstate commerce; that the movement of the car with the defective coupler was the proximate cause of plaintiff's injury; that plaintiff did not assume the risk of injury incident to the employment. Whether plaintiff was guilty of any negligence which contributed to the injury was, if applicable, a question for the jury.

The trial court, therefore, erred in directing a verdict for the defendant, and the case is reversed, with directions to grant a new trial.

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SANBORN, Circuit Judge (dissenting). I am constrained to agree with the trial court in this case, because the evidence seems to me to prove clearly that the plaintiff was charged with and was engaged in the specific duty of repairing the defective coupler which he had found. He was engaged in making a dangerous implement and place safe, and I am unable to assent to the proposition that the safety appliance acts charge the railroad companies with liabilities for every injury which those servants who know the defects in such appliances and are employed for the express purpose of remedying these defects may sustain while they are engaged in repairing them because the defects exists and need repairing.

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(Circuit Court of Appeals, Fourth Circuit, April 16, 1910.)

[179 Fed. Rep. 26.]

Master and Servant—Injuries to Servant—Fellow-Servant Law—Abolition—Constitutionality.*—A state constitutional provision abolishing the fellow-servant rule with reference to railroad employees is not in conflict with the federal Constitution or its amendments.

Master and Servant—Injuries to Servant—Relief Department Contract.—A railroad relief department contract, by which the employee was merely put to his election, on receiving an injury between receiving benefits or suing the railroad company for damages, was not in violation of Const. Va. § 162 (Code 1904, p. cclix), abolishing the fellow-servant rule with reference to railroads, and declaring that every contract or agreement, express or implied, made by an employee to waive the benefits of the section, should be invalid.

Courts—Federal Courts—State Practice.—On a writ of error in an action at law, the Circuit Court is governed on questions of practice by rules prevailing in the courts of the state in which the case was tried.

Master and Servant—Injuries to Servant—Relief Department Contract—Public Policy.†—Where a railroad employee became a member of its relief department pursuant to a voluntary application in writing, and was fully advised at the time of all the departmental

*For the authorities in this series on the subject of the constitutionality of employers' liability acts, see foot-note of *Missouri Pac. Ry. Co. v. Castle* (C. C. A.), 35 R. R. R. 436, 58 Am. & Eng. R. Cas., N. S., 436.

†See last paragraph of foot-note of *Sturgiss v. Atlantic C. L. R. Co.* (S. Car.), 29 R. R. R. 447, 52 Am. & Eng. R. Cas., N. S., 447; last foot-note of *Harrison v. Alabama M. Ry. Co.* (Ala.), 25 R. R. R. 511, 48 Am. & Eng. R. Cas., N. S., 511.

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regulations, a provision thereof that, in case of injury, he was required to elect between his right to sue for damages or to receive benefits, was not invalid as contrary to public policy.

Acceptance of benefits from relief association or insurance procured by master as affecting master's liability for injuries to servant, see note to *Atlantic Coast Line R. Co. v. Dunning*, 94 C. C. A. 139.

In Error to the Circuit Court of the United States for the Eastern District of Virginia, at Richmond.

Action by W. T. Day against the Atlantic Coast Line Railroad Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Plaintiff in error, hereinafter called the "plaintiff," sued the defendant in error, hereinafter called the "defendant," for the recovery of damages alleged to have been sustained by a personal injury caused by the negligence of defendant. In his declaration he avers: That on and prior to August 2, 1907, he was in the employment of defendant as an engineman, operating and running a locomotive engine drawing a train of freight cars over defendant's road between Rocky Mount, in the state of North Carolina, and Pinners Point, in the state of Virginia. That on the 3d day of August, 1907, the throttle valve on the engine was, and had been for several days, out of repair. "That he had notified defendant's employee at Rocky Mount, whose duty it was to repair same. That, notwithstanding such notice, they negligently and carelessly failed to repair said valve and permitted it to remain out of repair." That by reason of the condition of said valve the steam "came into the dome of the engine." The declaration describes the construction of the engine, the office performed by the several parts in its operation, and the manner of operating it. He states that it is necessary, in operating the engine, that an engineman and fireman shall be upon it; the engineman being the superior in authority. He sets out a rule of the defendant company by which the engineman is directed not to leave his engine during a trip, except in case of necessity, and when he does so the fireman, or some other competent person, be left in charge. The fireman is required to take charge of the engine when the engineman is absent, and not to leave it until his return; nor suffer any unauthorized person to be upon it.

Plaintiff thus describes the manner in which he was injured: "On the evening of August 3, 1907, when plaintiff had reached the town of Suffolk, in Virginia, on his usual trip from Rocky Mount to Pinners Point, he stopped his train to take on water for engine. Plaintiff dismounted from cab, directing the fireman to take charge of the engine in his absence, and walked on the ground to the front of the engine, where he proceeded to oil

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the eccentric of the engine, which needed oiling. Before dismounting he closed the throttle as well as it could be in its leaky condition, set the upright lever at the center of the quadrant, which made it impossible for steam to get into the cylinder and start the engine. He got up on the main driving rod of the engine, a large bar of iron, which connects the two driving wheels and is operated on a crank, so that it rises and falls as the driving wheels revolve. He was on his knees on said driving rod at the front end of the engine, 25 feet from the cab, and from the lever and other appliances that control the engine and out of sight of them, with his arm extended under the boiler oiling the eccentric. While in this position, the fireman being in charge of the engine, and wanting a hammer that was behind the upright lever, carelessly and negligently pushed said lever forward so that he might reach in behind it and get the hammer. This opened the valve that let steam into the cylinder. The leaky throttle had allowed the steam to come down the said valve, and this, being opened by the fireman's careless and negligent act, let the steam into the cylinder and started the engine. The driving rod, being raised by this motion, threw the plaintiff to the ground without any negligence on his part, upon his back, and he fell upon an old iron drawhead and sustained serious injury to his spine, by reason of which injury he is unable to continue his work as an engineman, all of which was the result of said fireman's careless and negligent act," etc. He puts his damage at \$30,000.

Defendant filed a special plea in which it sets forth that, "realizing the hazards to which its employees were exposed, and the large premiums demanded of them by the insurance companies, it has, prior to the time when plaintiff entered into the employment, established, for such of its employees as voluntarily desired to join it, a mutual benefit department of its service, called the 'Relief Department.'" The provisions of the Relief Department are set out in full, and a copy of the rules and regulations by which it is operated and controlled are attached and made a part of the plea. Defendant in its special plea also sets out the amount received and paid out by it in the operation of said department, together with the amount for which it is liable by reason of insurance. It further avers that plaintiff, at the time of entering its employment on October 27, 1906, was eligible to, and made a voluntary application in writing in due form to be admitted as a member of, said Relief Department under the terms of which said application he agreed to the terms and conditions of said contract, and further agreed to be bound by all the regulations of said department under the terms of which said application he was. on said 27th day of October, 1906, duly admitted to membership in said Relief Department and remained a member thereof until the 5th day of May, 1908. "That on or

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about the 2d day of August, 1907, the plaintiff in this action was injured by an accident at Suffolk, Va.” That by reason of said injury plaintiff was entitled, under the terms of his contract of membership, to benefits provided by said regulations, from the 3d day of August, 1907, at the rate of \$2 per day, during the continuance of disability occasioned by said accident and injury, for the term of 52 weeks thence next ensuing, and thereafter at the rate of \$1 per day during the continuance of said disability or until he was able to work. That, after said injury, pursuant to his contract of membership and to the regulations of said department, plaintiff was entitled to elect between his right to receive benefits from said department and his right to bring suit against this defendant on account of said injury. That, pursuant to his said right, plaintiff did exercise his election and did accept and receive from the said department benefits to which he was entitled under the regulations thereof, to wit, \$2 per day for the term of 84 days, and that, pursuant to said election the said department paid plaintiff, by way of benefits, the sum of \$168; said payment being made under the terms of said regulations, by drafts or checks on said relief fund. Defendant set up and relies upon the matters and things set forth in its special plea, the election of plaintiff, and the receipts by him of the benefits to which he was entitled, as a full and complete release from any and all claims or demands against it by reason of the injury sustained by him, all of which is properly pleaded. Defendant also, by proper plea, denied any liability to plaintiff, averring that it was not guilty, etc.

Plaintiff demurred to the special plea for that “it appears from the declaration that the plaintiff was injured through the negligence of a fellow servant, and that section 162 of the Constitution of Virginia (Code 1904, p. cclix) makes null and void any and all and every contract that waives the benefits of that section, and the contract set up by the defendant attempts to waive the benefit of that section.”

The cause came on for trial upon the demurrer to the special plea. The court overruled the demurrer and gave plaintiff leave to answer the plea, which he declined to do, whereupon the court rendered judgment, dismissing the action. Plaintiff excepted, assigned as error the action of the court overruling the demurrer, and rendered judgment against him, and brought the case to this court upon a writ of error.

W. S. McNeil, for plaintiff in error.

W. B. McIlwaine and *M. Carter Hall*, for defendant in error.

Before GOFF and PRITCHARD, Circuit Judges, and CONNOR, District Judge.

CONNOR, District Judge (after stating the facts as above). Passing, for the present, other questions discussed on the argu-

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ment, we pause to inquire whether, as alleged by plaintiff, the Constitution of Virginia, section 162 (Code 1904, p. cclix), prohibits or invalidates the contract relied upon by defendant, as the basis of the release by the plaintiff, of the cause of action set out in the declaration. For this purpose the averments of the declaration are taken to be admitted by the special plea, and those of the plea to be admitted by the demurrer. So much of section 162 of the Constitution of Virginia as relates to the question presented by the pleadings is in these words:

"The doctrine of fellow servants, so far as it affects the liability of the master for injuries to his servants resulting from the acts or omissions of any other servant, or servants of the common master, to the extent hereinafter stated, is abolished as to every railroad company engaged in the physical construction, repair or maintenance of its roadway, track or any of the structures connected therewith, or in any work in, or upon a car or engine standing upon a track, or, in the physical operation of a train, car, engine or switch, or in any service requiring his presence upon a train, car or engine; and every such employee shall have the same right to recover for every injury suffered by him from the acts or omissions of any other employee or employees of the common master that a servant would have (at the time when this Constitution goes into effect) if such acts or omissions were those of the master himself in the performance of a non assignable duty."

The section contains further provisions, in regard to liability for the negligence of a fellow servant not material to any phase of this case, and further provides:

"The physical construction, repair or maintenance of the roadway, track or any of the structures connected therewith, and the physical construction, repair, maintenance, cleaning or operation of trains, cars or engines shall be regarded as different departments of labor, within the meaning of this section; knowledge by any such railroad employee injured, of the defective or unsafe character or condition of any machinery, ways, appliances or structures, shall be no defense to an action for injury caused thereby."

After providing for an action by the legal or personal representative of any employee whose death shall be caused by any injury sustained by the acts or omissions of a fellow servant or defective ways, it is provided:

"Every contract or agreement, express or implied, made by an employee to waive the benefits of this section shall be null and void." Section 162, Const. Va.

It was evidently the purpose of the framers of this section of the Constitution of Virginia to abolish the common-law doctrine of the nonliability of the common master for injuries resulting from the negligence, either by acts, or omissions, of a fellow

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servant, subject to certain exceptions and limitations. Beginning with the enactment of the employer's liability act by the British Parliament, we find, in many American states and continental countries of Europe, the enactment of similar statutes, the purpose and effect of which are either to abolish the doctrine altogether or to restrict and limit its application—they are usually confined to employees of railroads. Their constitutionality has been upheld by the courts with practical uniformity. That they do not conflict with the federal Constitution, or the amendments thereto, is settled. *Missouri Pacific Railway Co. v. Mackey*, 127 U. S. 205, 8 Sup. Ct. 1161, 32 L. Ed. 107; *Chicago, Kansas & Western Railroad Co. v. Pontius*, 157 U. S. 209, 15 Sup. Ct. 585, 39 L. Ed. 675.

Assuming that the averments of the declaration bring the plaintiff's case within the provisions of the Constitution, and that "he was injured by an act or omission of a fellow servant," as defined and limited by the language of the section, does the contract, set forth in the special plea, waive any of the "benefits" conferred by said section? It is manifest that, by becoming a member of the Relief Department, plaintiff did not waive, or deprive himself of the right to maintain, an action against defendant for an injury sustained by him while in its service as defined by the Constitution "by an act or omission of a fellow servant." There is nothing in the rules or regulations of the Relief Department which could be averred or pleaded in bar of an action brought by him for such injury; nor did he, by becoming a member thereof, make any "contract, express or implied," by which he waived any of the "benefits" conferred upon, or secured to, him by the Constitution. Giving the language of the section the most liberal construction possible, nothing more is secured to the employee, injured by the negligence of a fellow servant, than the right to recover from the common master damages for such injury, in the same manner and to the same extent, as if the same acts or omissions were those of the master himself in the performance of a nonassignable duty. We are unable to perceive how, by any possible interpretation, the scheme known as the Relief Department, or becoming a member thereof, can be said to waive the right of action secured to the employee by the Constitution. As uniformly held by other courts, in which the same contention has been made, the employee does not waive, or agree to waive, any rights to which he is entitled by becoming a member of the Relief Department. He simply agrees that, after the injury is sustained, and his cause of action accrues, he will elect whether to sue for damages or accept the benefits secured by the Relief Department—that he will not do both. There is no suggestion that plaintiff made his election under such circumstances or conditions, either mental, moral, or physical, making it inequitable to enforce it; similar statutes have been enacted,

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whereby agreements made in advance of an injury, caused by the negligence of a fellow servant, or defective appliances, ways, or means are declared to be invalid. The courts have held that becoming a member of the Relief Department was not within the letter or spirit of these statutes. *Pittsburgh, C., C. & St. L. R. R. v. Cox*, 55 Ohio St. 497, 45 N. E. 641, 35 L. R. A. 511; *Railroad v. Moore*, 152 Ind. 345, 53 N. E. 290, 44 L. R. A. 643; *Hamilton v. Railroad (C. C.)*, 118 Fed. 94. At the moment plaintiff sustained the injury for which this action is brought, the right of action, or "benefit," secured to him by the Constitution (section 162) of Virginia was complete; his membership in the Relief Department did not affect it in the slightest degree.

Defendants insists that, the ground of the demurrer being specifically limited to the provisions of the section 162 of the Constitution, it is not open to plaintiff, upon this writ of error, to attack the special plea for any other ground. The assignment of error is confined to the action of the court in overruling the demurrer and rendering judgment against plaintiff. This being an action at law, we are governed, in questions of practice, as near as may be, by rules prevailing in the courts of the state of Virginia. Passing the question of practice, we will consider the other question, argued by counsel for plaintiff in a well-considered oral argument and printed brief, in which he insists that, independent of the prohibitory provisions of the Constitution, the contract entered into by plaintiff, when he became a member of the Relief Department, is against public policy and void. In passing upon this contention we are confined to averments in the special plea, which are admitted *pro hac vice* to be true. This excludes any suggestion that the plaintiff was not fully advised of the regulations of the Relief Department as it alleges "that a book containing the regulations of the said Relief Department was on or about May 30, 1907, delivered to the plaintiff," or that he did not enter into it voluntarily, as it is alleged that "he made a voluntary application in writing in due and legal form to be admitted as a member of said Relief Department," or that, after sustaining the injury, he was under coercion, or was misled, or kept in ignorance of his rights in the premises, as it is alleged "that he did exercise his election and did accept and receive from said department benefits to which he was entitled under the regulations thereof."

The sole question, therefore, is whether there is such inherent vice in the plan or scheme, established by defendant, set forth in the plea, as brings it under the condemnation of the principles of the common law, rendering all contracts made, and all acts done under and pursuant to it, null and void, or whether the relations existing between the plaintiff and the defendant were such as to render it contrary to sound public policy for them to enter into the contract, or to enforce rights, or set up de-

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fenses acquired under it. The question of the validity of the contract, or contracts, in all respects similar to the one before us, has been so fully discussed by the courts, both state and federal, and so uniformly upheld, that nothing new is open to be said. It has been expressly decided by this court. In *A. C. L. R. Co. v. Dunning*, 166 Fed. 850, 94 C. C. A. 128, in well-considered and amply-sustained opinion by Judge Morris, in which Mr. Chief Justice Fuller concurred, the same contract relied upon by defendant herein was upheld. The learned judge says:

“By a great number of carefully considered adjudications of the courts, both state and federal, contracts of this character have been upheld and determined not to be against a sound public policy, but distinctly beneficial to the employee, as well as wise on the part of the employer.”

He cites a large number of cases sustaining his opinion. It is not necessary that we do more than refer to the volume of the Federal Reporter in which the case is reported. The basis upon which all of the decisions rest is that, by becoming a member of the Relief Department, the employee does not waive, or contract against, liability for damages for an injury sustained by the negligence of the employee. That, after sustaining the injury, he is free to maintain an action for damages without regard to his being a member of the department. That he is entitled to the benefits secured by membership without regard to negligence or legal liability of the employer. That when he elects to take such benefits he releases, and not until then, the employer from other or further liability. With an evident and frequently expressed determination to strictly construe all contracts made by employees of public service corporations, or those in whose service the employment involves unusual hazard, waiving any rights, the courts have, with practical uniformity, and by the same process of reasoning, upheld this plan or scheme, adopted by railroad companies, and, so far as we are informed, concurred in by their employees.

This injury having occurred prior to the enactment of the federal employer's liability act (April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. Supp. 1909, p. 1171]), the provision of that statute in regard to these contracts is not presented.

The judgment must be affirmed.

SWOBODA v. UNION PAC. R. CO.

(Supreme Court of Nebraska, June 10, 1910.)

[127 N. W. Rep. 215.]

Constitutional Law—Equal Protection of the Laws—Employer's Liability Act.*—The employer's liability act of 1907 (chapter 21, § 3, Comp. St. 1909), providing that every railway company operating a railway engine, car or train in the state of Nebraska shall be liable to any of its employees, who at the time of injury are engaged in construction or repair work, or in the use and operation of any engine, car, or train for said company, for all damages which may result from the negligence of any of its officers, agents, or employees, is a valid law under the Constitution of Nebraska, and is not repugnant to the fourteenth amendment of the federal constitution.

Master and Servant—Injuries to Servant—Employer's Liability Act.—Evidence examined and set out in the opinion held sufficient to show that plaintiff at the time of his injury was engaged in construction or repair work within the meaning of such act.

(Syllabus by the Court.)

Appeal from District Court, Douglas County; Sutton, Judge.

Action by Frank Swoboda against the Union Pacific Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Nelson H. Loomis, Edson Rich, James E. Rait, and E. H. Crocker, for appellant.

Smyth & Smyth, for appellee.

FAWCETT, J. This case involves a construction of section 3, c. 21, Comp. St. 1909, adopted in 1907, commonly called the "Employer's Liability Act." One of the departments of defendant's shops in the city of Omaha is known as the blacksmith shop. Plaintiff was employed therein as a helper. He and another helper, Carl Gall, were operating a steam hammer, weighing about 500 pounds, in flattening iron washers. Gall was operating the hammer by means of levers. Plaintiff stood in front of the hammer, placing and removing the washers on a steel die of the hammer. One blow was required to flatten each washer. As the hammer lifted, plaintiff would remove the flattened washer with his hand, and replace another for the next stroke of the hammer. The negligence alleged is that Gall, who was controlling the hammer, carelessly and negligently caused it to descend while plaintiff's right hand was thereunder, and

*See foot-note of *Missouri Pac. Ry. Co. v. Castle* (C. C. A.), 35 R. R. R. 436, 58 Am. & Eng. R. Cas., N. S., 436.

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while plaintiff, in the exercise of due care and in the performance of his duties, was endeavoring to remove from the plate a washer theretofore placed by him thereon. The evidence shows that the washers then being made were for general use by defendant in the repair of its engines and cars; that when cars or engines are being repaired, and a bolt goes through a piece of wood, one of these washers is always placed at the head of the bolt; that the shop in which plaintiff was working employs about 135 men; that there are 29 blacksmiths who work the forges, 4 driving hammers, 5 bolt machines, 2 shears, about 22 furnaces in operation, 9 power hammers, and 2 similar to the one in question. The foremen of the shop, when asked what they did in the way of repairing iron work on cars, answered: "Every article which is made of metal. We repair every article of iron or steel; do the necessary repairing or make new where it is ordered;" that when engines are to be repaired they are taken to the machine shop and stripped down to the case and whatever is necessary to be repaired on the engines is sent to the blacksmith shop "and we repair those things and take them back to the machine shop and put them back on the engine;" that any part of the iron work or metal parts of an engine that get out of repair are sent to that shop to be repaired; that they also do the repairing of iron work on freight cars, box cars, passenger cars and engines, and also construct new parts of cars and engines.

The defenses relied upon are that the work upon which plaintiff was engaged at the time of his injury was not "construction" or "repair work," as such words are used under the employer's liability act; that plaintiff's injuries were received by and through the carelessness of his fellow servant contributing thereto; that the employer's liability act under which plaintiff is seeking to recover is violative of section 1, art. 14, of the amendments to the Constitution of the United States; and that "said act by its provisions makes railroad companies liable for injuries to employees resulting from the negligence of fellow servants and co-employees when such injured employees are injured in construction and repair work not involving the dangers and hazards peculiar to the business of constructing, maintaining, and operating railroads, when no such liability is attached by the state of Nebraska to other employers for similar hazards, thereby depriving railroad companies of the equal protection of the laws accorded to all other litigants, persons, or corporations within the state of Nebraska, and violating that part of section 1 of the fourteenth article of amendments to the Constitution, which provides 'no state shall make or enforce any law * * * nor deny to any person within its jurisdiction the equal protection of the laws.'" From a judgment in favor of plaintiff, defendant appeals.

Section 3, c. 21, Comp. St. 1909, provides: "That every rail-

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way company operating a railway engine, car, or train, in the state of Nebraska shall be liable to any of its employees, who at the time of injury are engaged in construction or repair work, or in the use and operation of any engine, car or train for said company. * * * for all damages which may result from negligence of any of its officers, agents, or employees, or by reason of any defects or insufficiency due to its negligence in its cars, engines appliances, machinery, track, roadbed, ways or works." Counsel for defendant in their brief clearly state their position as follows: "The defendant contends that this statute affects only such employees as are injured through a risk or hazard incident and peculiar to the business of constructing, repairing, and operating railroads, and that, while, the statute on its face is broad enough to cover other employees, if extended beyond railroad hazards, it is violative of the fourteenth amendment to the Constitution of the United States, for the reason that the state of Nebraska cannot impose burdens or restrictions upon railroad companies with reference to personal injuries unless all employers are equally affected by the statute in cases where the injuries arise in the same manner." Authorities are not wanting to sustain defendant's contention. They are cited and ably presented in defendant's brief. But the clear weight of authority and the better reasoning is the other way. It would be interesting to review the authorities, but that has been so ably done by the Supreme Court of the United States, and other courts, in the cases cited below, that we shall not enter into a general review of the cases.

In *Missouri P. R. Co. v. Mackey*, 127 U. S. 205, 8 Sup. Ct. 1161, 32 L. Ed. 107, the syllabus reads:

(1) "The law of Kansas making a railroad company liable to an employee for the negligence or mismanagement of other employees or agents of the same company is not in conflict with the fourteenth amendment to the Constitution of the United States, in that it deprives the company of its property without due process of law, and denies to it the equal protection of the laws."

(2) "Legislation which is special in its character is not obnoxious to the last clause of the fourteenth amendment, if all persons subject to it are treated alike, under similar circumstances and conditions, in respect both of the privileges conferred and the liabilities imposed."

Instruction No. 8 given by the court below, and complained of by defendant here, was evidently taken from the opinion in this case. The instruction in almost identical language is quoted by Mr. Justice Field, and approved.

In *Tullis v. Lake Erie & Western R. Co.*, 175 U. S. 348, 20 Sup. Ct. 136, 44 L. Ed. 192, the court say: "Considering this statute as applying to railroad corporations only, we think it

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cannot be regarded as in conflict with the fourteenth amendment." The opinion by Mr. Chief Justice Fuller then reviews a number of the cases on the subject, among them *Peirce v. Van Dusen*, 78 Fed. 693, 24 C. C. A. 280, 69 L. R. A. 705, which, considering the prominence of the judges who decided it, we will briefly refer to. The opinion was by Harlan, Circuit Justice, and associated with him were Circuit Judges Taft (now President) and Lurton (now Associate Justice of the Supreme Court). The third paragraph of the syllabus reads: "The third section of said statute, altering the rule as to the liability of an employer for the negligence of fellow servants, as it applies to all railroad corporations operating railroads in the state, and to all of a given class of railroad employees, is not repugnant to the provision of the Constitution of Ohio that all laws of a general nature shall have uniform operation throughout the state." To show that the same argument was made before these eminent judges as is being made here, we quote from the opinion, page 701 of 78 Fed., page 287 of 24 C. C. A. (69 L. R. A. 705): "But it is contended that the Ohio statute is repugnant to the provision of the Constitution of Ohio declaring that 'all laws of a general nature shall have uniform operation throughout the state.' Article 2, § 26. The argument made in support of this view by the learned counsel for the receiver may be thus summarized: That the act imposes a liability for damages for the negligence of fellow servants only as against a railroad company operating a railroad within Ohio; that it confers a right of action only upon employees of such railroad companies; that no other employer is subject to the liability, and no other employee is given the right; that the act selects from the general class of employers railroad companies operating railroads, and imposes upon them a special burden; that the act is special class legislation, not uniform throughout the state, and applies to no person or company engaged in any other occupation employing servants, although the occupation be equally hazardous. Consequently, the act is special in its operation and effect, is confined to particular corporations engaged in a specific business, does not cover the whole subject of the relations of master and servant, and is not, therefore, of a general nature, and of uniform operation throughout the state, within the meaning of the Constitution of Ohio." The opinion then reviews the cases cited by counsel in support of their contention, and on page 704 of 78 Fed., page 291 of 24 C. C. A. (69 L. R. A. 705), concludes: "We do not deem it necessary to pursue this subject further. We think it clear that the Ohio statute is not obnoxious to the constitutional provision requiring all laws of a general nature to have a uniform operation throughout the state. As it applies to all railroad corporations operating railroads within the state, it is, within the meaning of the state Constitution, general in its

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nature; and, as it applies to all of a given class of railroad employees, it operates uniformly throughout the state."

In *Nicholson v. Railroad*, 138 N. C. 516, 519, 51 S. E. 40, 41, the court, in considering a statute giving any employee of a railroad "operating" in that state a cause of action for injuries suffered because of the negligence of a fellow servant, say: "But the act applies only to employees of a 'railroad operating,' not that such employees must be operating the trains, but they must be employees in some department of its work, of a railroad which is being operated. Such business is a distinct, well-known business, with many risks peculiar to itself, and all the employees in such business, whether running trains, building or repairing bridges, laying tracks, working in the shops, or doing any other work in the service of an 'operating railroad,' are classified and exempted from the rule which requires employees to assume the risk of all injuries which may be caused by the negligence of a fellow servant."

In *Georgia Railroad v. Ivey*, 73 Ga. 499, 504, in considering a similar statute, the court say: "This is no special law. It is a law applicable to all railroad companies and their employees, whether employed in running trains or not. It would be more special and less general if applicable only to those engaged in running the trains. It is a general law embracing in its terms all railroads and their employees."

Without pursuing the subject further, it is sufficient to say that statutes similar to ours are sustained and held not in conflict with the fourteenth amendment to the Constitution of the United States, or with state Constitutions against special or class legislation, in the following cases: *Ditberner v. Chicago, M. & St. P. R. Co.*, 47 Wis. 138, 2 N. W. 69; *Kane v. Erie R. Co.*, 133 Fed. 681, 67 C. C. A. 653, 68 L. R. A. 788; same case in 155 Fed. 118, 83 C. C. A. 564; *St. Louis & S. F. R. Co. v. Mathews*, 165 U. S. 1, 17 Sup. Ct. 243, 41 L. Ed. 611; *Campbell, Receiver, v. Cook*, 86 Tex. 630, 26 S. W. 486, 40 Am. St. Rep. 878; *Hancock v. Railway Company*, 124 N. C. 222, 32 S. E. 679, and a very extended discussion of the subject in *Callahan v. St. Louis, M. B. T. Ry. Co.*, 170 Mo. 473, 71 S. W. 208, 60 L. R. A. 249, 94 Am. St. Rep. 746. We have also announced the same doctrine in *Insurance Company of North America v. Bachler*, 44 Neb. 549, 565, 62 N. W. 911, 915, where we had under consideration the provisions of the valued policy law, which allows the taxing of an attorney's fee in cases where a recovery is had by the assured. We there said: "It is said that this act is class legislation because it applies only to insurance companies; but where a law is general and uniform throughout the state, and operates alike upon all persons and localities of a class, it is not objectionable as wanting uniformity of operation."

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The defendant's contention that plaintiff is not within the class protected by the statute because he was not injured through a risk or hazard incident and peculiar to the business of constructing, repairing, and operating railroads, is not sustained by the wording of the statute. The statute reads: "That every railway company operating a railway engine, car or train in the state of Nebraska shall be liable to any of its employees, who at the time of injury are engaged in construction or repair work." That constitutes one class of employees who are entitled to the benefit of the statute. Then, separated from the former by the disjunctive "or," we have the other class, viz., "or in the use and operation of any engine, car or train for said company." It is clear from this wording of the statute that the Legislature intended that the fellow servant rule (not law) should not apply to any of the employees of any railroad in the state who were either engaged in the operation of engines, cars, or trains, or were engaged in construction or repair work. Substantially the same reason sustains the entire classification; that is to say, there are dangers inherent in and peculiar to all the vocations described in the statute, which are rarely, if ever, encountered by employees working for a master not engaged in the operation of a railway. The Legislature well knew that substantially all railway construction or repair work is dangerous, performed either in the immediate vicinity of tracks upon which trains are passing or by the use of dangerous machinery, as in the case at bar. Classifications should receive a practical construction, and we are of opinion that a reasonable application of the law to the facts in the case before us not only brings the plaintiff within its purview, but forbids a holding that the law is obnoxious to the Constitution of the United States or to the Constitution of the state of Nebraska.

We must not be understood as deciding that all work of construction or repair of any article or structure performed in the service of a railroad company comes within the purview of the statute. The work of a railroad company is divided into many departments. The duties and hazards of employees in one department may be as dissimilar from those in other departments as are those of a clerk or bookkeeper in the uptown headquarters from those of an engineer or brakeman on a train; and questions may hereafter arise as to the scope of the act under consideration, which we do not now decide. But, where the work of construction or repair is as closely connected with the actual operation and use of the railroad as the work of the present plaintiff, it seems clear that it is within the class of hazards covered by the act.

Approving and following the authorities above cited, we hold that the act under consideration is valid, and that plaintiff, at

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the time of his injury, was engaged in construction or repair work within the meaning of the act. This being true, the court did not err in giving the eighth instruction complained of nor in refusing to give the fourth instruction requested by the defendant.

The judgment of the district court is therefore affirmed.

CLEVELAND, C., C. & ST. L. RY. CO. v. FOLAND

(Supreme Court of Indiana, June 24, 1910.)

[92 N. E. Rep. 165.]

Master and Servant—Injury to Servant—Fellow Servants.*—One occupying the position of vice principal, who, after discharging the duty of the master in furnishing a safe place or safe appliances, descends from that obligation to assist in the manual act, is a fellow servant, and the master is not liable for his negligence in doing such manual act resulting in injury to a servant.

Master and Servant—Injury to Servant—Fellow Servants.—A master is not liable to his servant for the negligence of a co-servant in respect to the details of the work, and he need not protect the servant against the mere transitory perils that the execution of the work occasions.

Master and Servant—Injury to Servant—Fellow Servants.*—A superior servant is not a vice principal in giving a negligent order in the progress of changing work, and where it is not shown what, if any, authority a foreman of a bridge crew of a railroad company had, except that of control and direction of the manner of doing the work, there is no common-law liability for the foreman's negligence resulting in injury to a member of the crew, unless the foreman acted in place of the company discharging a master's duty.

Pleading—Injury to Servant—Fellow Servants.—The broad allegations of a complaint in an action for injuries to a servant of a railroad company engaged as a member of a bridge crew as to the power of the foreman of the crew and his authority to direct the work and control the men do not control the specific allegations that

*For the authorities in this series on the question whether a foreman or other superior servant was acting as a fellow servant or vice principal at the time an employee of the common master under his orders was injured through his negligence, see last paragraph of last foot-note of *Hallock v. New York, etc., Ry. Co.* (N. Y.), 35 R. R. 332, 58 Am. & Eng. R. Cas., N. S., 352; *Konoski v. Delaware, etc., R. Co.* (N. J.), 34 R. R. 78, 57 Am. & Eng. R. Cas., N. S., 78; last foot-note of *Silvia v. New York, etc., R. Co.* (Mass.), 34 R. R. 74, 57 Am. & Eng. R. Cas., N. S., 74.

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the injury was occasioned by a negligent direction under the changing conditions under which the work was carried on by one not discharging the duties of a master, but those of a superior servant in giving the direction, thereby relieving the company from liability.

On petition for rehearing. Overruled.

For former opinion, see 91 N. E. 594.

A. B. Everhard, C. E. Cowgill, L. J. Hackney, and Frank L. Littleton, for appellant.

Bagot & Pence, for appellee.

MYERS, J. The court should have referred in its original opinion to the case of Indianapolis, etc., Co. v. Kane, 169 Ind. 25, 80 N. E. 841, 81 N. E. 721, as the case was familiar to the writer and to the court, but the question of nonliability under the employer's liability act was not raised in that case, either upon the record or the briefs, and the majority of the court were at that time of the opinion that, owing to that fact, it would be understood by the profession, but upon further consideration had determined that it should be referred to, in order that the reason for the seeming conflict between that case, and Indianapolis, etc., Co. v. Kinney, 171 Ind. 612, 85 N. E. 954, and this case, might plainly appear, and had determined to withdraw the opinion for the purpose of making the explanation, for that case is in seeming conflict with this case, and the Kinney Case, and was so understood by the writer, and the court at the time. We have again examined the complaint upon the lines urged by appellee in its support, and specially the cases relied on: Taylor v. Evansville, etc., Co., 121 Ind. 124, 22 N. E. 876, 6 L. R. A. 584, 16 Am. St. Rep. 372; Nall, Adm'r, v. L. N. A. & C. Co., 129 Ind. 260, 28 N. E. 183, 611; Knickerbocker, etc., Co. v. Gray, 171 Ind. 395, 84 N. E. 341.

We are clearly of the opinion that the theory of the complaint was of liability under the employer's liability act, and appellee's original brief fairly so indicates by citation of section 8017, Burns' Ann. St. 1908, and cases under that act under points and authorities as to the sufficiency of the complaint, though there is nowhere else in the record any express declaration of the theory of the complaint, and we might have been justified in reversing the judgment upon that ground; but, in view of the state of the decisions when the cause was tried, appellee ought not to be restricted as in case of a settled condition of the decisions, and for that reason we again review the complaint upon appellee's theory now urged of stating a common-law liability. It is due to appellee to say that the cases cited by his counsel upon this application have not been followed in their application to the doctrine of vice principal, and have been distinguished in effect in a number of cases.

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The case of *Taylor v. Evansville, etc., Co.*, supra, was undoubtedly correct in its holding that the master mechanic was in a general way a vice principal, but, as to the particular act through which Taylor was injured, he was a fellow servant. Taylor was injured by the negligent act of the master mechanic in assisting in the removal of the equalizer, and was clearly a co-employee within the rule cited by the learned justice who wrote that opinion. He says: "If Torrence [the master mechanic] was acting in the capacity of a co-employee at the time his negligence caused the appellant's injury, the action cannot be maintained, although he was appellant's superior, and had the right to retain or discharge him. An agent of high rank may be at the time the act is done a fellow servant of an employee, occupying a subordinate position. *Hussey v. Coger*, 112 N. Y. 614, 20 N. E. 556, 3 L. R. A. 559, 8 Am. St. Rep. 787. If, for instance, the general superintendent should take hold of one end of an iron rail to assist an employee of the company in loading it on a car, he would be as to that single act a fellow employee, although as to other acts he might be the representative of the master." The error in the application of the rule is plain, for it is stated that, "while the appellant was engaged in the work of removing the key of the equalizer under the master mechanic's direction, the equalizer was negligently pulled out of its place *by the master mechanic* [our italics], and it fell upon the appellant and very seriously injured him." The work they were about was disconnecting an equalizer and removing it from its place, in order to enable the master mechanic to examine it, for the purpose of ascertaining whether the key could be changed. That the application of the rule was inadvertently made in that case fully appears from the statement of the rule and the facts stated. In the second edition of Judge Elliott's work on Railroads (section 1322), he says: "The rule does not rest upon the doctrine of subordination, but upon the principle that it is the master's duty to provide safe machinery, and appliances, and in performing that duty the master mechanic occupies the master's place." This rule is well established, but when the master mechanic had discharged the duty of the master of ordinary care in furnishing a safe place or safe appliances, but descends from that obligation and duty to assist in the manual act, he is a fellow servant. The rule is well stated in another case written by Judge Elliott—*Krueger v. Louisville, etc., Co.* (1886) 111 Ind. 51, 11 N. E. 957—where he says, quoting from *Indiana, etc., Co. v. Parker*, 100 Ind. 181, also written by him: "The negligence of a fellow servant, or co-employee *acting as such* [our italics], will not authorize a recovery in any case, although the fellow servant or co-employee may be a superior officer, an agent, or a foreman, but, if the superior agent is charged with the performance of the master's

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duty, *then in so far as that duty is concerned* [our italics] his acts and his negligence are the acts and the negligence of the master, and not simply those of a co-employee, or fellow servant."

The distinction is well stated in *Ford v. Fitchburg R. R. Co.*, 110 Mass. 240, 14 Am. Rep. 598, where it is said: "The agents who are charged with the duty of supplying safe machinery are not in the true sense of the rule relied on to be regarded as fellow servants of those engaged in operating it. They are charged with the master's duty to his servant. They are employed in distinct and independent departments of service, and there is no difficulty in distinguishing them, *even when the same person renders service by turns in each* [our italics] as the convenience of the employer may require." And this is true in jurisdictions where superior agents, such as section foreman, are recognized as vice principals, a rule which has never obtained in this state. *Gann v. Railroad*, 101 Tenn. 380, 47 S. W. 493, 70 Am. St. Rep. 687. The case of *Nall v. L. N. A. & C. Co.*, supra, is more nearly in point as respects the allegations of the complaint before us than any other case cited, or that we have been able to find. There is, however, one marked divergence between the two cases. In that case the deceased was a track or section hand, taken out of his usual employment to do an extraordinary and hazardous work. Helms, in charge of the work, is designated in the complaint as "agent, and chief foreman of the defendant," "defendant's agent in chief," "he alone directing and commanding how such work should be done, and who should do it." It was there said that "styling him in the complaint as 'agent,' 'chief,' or representative of defendant, casts no light upon the matter. * * * The law imposes certain duties. * * * The agent to whom he entrusts such duty, regardless of his rank, acts as the master and in his place." The case is grounded upon *Taylor v. Evansville, etc., Co.*, without noting the distinction and inadvertence of the application of the rule as we understand it in that case. The *Nall Case* was correctly decided upon other grounds, which are stated on petition for rehearing, because it shows an unusual condition with which the railway company was suddenly confronted, and requiring immediate action, and requiring not only the furnishing of safe appliances, but an intelligent and directing authority in order to accomplish a specific thing not contemplated by the employment of the servant, and also putting him in a place in itself dangerous, and of continuing danger, and it was properly held that this directing head was necessarily the master.

The case at bar is essentially different in several particulars. Appellee was engaged in the usual line of an employment in which he was experienced. The place where he was directed to work is not alleged to have been dangerous or hazardous.

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It only became so by the manner in which the common employment was carried on. There was no defect in the appliances or machinery, or danger in the place where the work was carried on alleged, and when the master has used ordinary care in selecting the appliances, and continues this duty, and the work is not in a dangerous place, or is not rendered dangerous, by some reason other than the negligent manner in which it is carried on, the master's duty is discharged. If this were not true, the master would become an insurer of safety. Characterizing the superior as "superintendent, foreman, and boss" adds nothing to his relation. The allegations simply show him to be a superior in a common employment. It is alleged that the defendant delegated to the "superintendent, foreman and boss," "power and authority to provide ways, works, tools and machinery and appliances with which to do and perform the work." It is not alleged that there was any neglect in providing them. It is alleged that the defendant gave and delegated to him "power and authority" to direct the manner of doing the work and what each employee should do, and they were bound to conform to his orders. That is no more than the power which every superior servant has. It is not alleged that the place where he was directed to work was dangerous, so that there is not duty shown to have been neglected in that respect, unless it can be said that the place must be kept safe under all conditions, and the negligence charged is not in rendering the place unsafe by reason of anything in or about the place, but by reason of a condition arising and created, outside of the place, in the progress of the work, by the order to remove braces, causing a piling to fall, which could, or was as likely to, fall in any other direction as the direction of appellee. In other words, if appellee had been in some other place where he had a right to be, and had been injured by the falling piece, he would upon the theory of this complaint so far as a common-law action is concerned have had as much a right of action as he here claims. We only call attention to this fact to show that it is not because he was in a particular place, but because of the alleged negligence in removing the stay—that is, the manner in which, under a common-law employment, a constantly changing general work was carried on—that he was injured. In *Knickerbocker Co. v. Gray*, *supra*, the complaint charged both defective machinery and an unsafe place, with direction from one who was charged with the duty of the master to furnish safe machinery, and a safe place to work, to direct Gray to leave his usual place of employment, and go into the unsafe place, where he was injured from the unsafe condition there existing. The question of the authority of the engineer to direct Gray arose upon the evidence, and it was shown that the engineer was charged with the duty of hiring and discharging men, and to look after the engines, machin-

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ery, and engine rooms, which necessarily implied the duty of keeping them safe, a master's duty. So in *Ohio, etc., Co. v. Stein* (1894) 140 Ind. 61, 39 N. E. 246, it was held that the duty of a foreman of machine shops to see that the appliances sent out were ordinarily safe was the master's duty, and in the same volume in *Indiana, etc., Co. v. Snyder*, 647, 39 N. E. 912, that a carpenter charged with the duty of making and placing hand car handles is a vice principal as to that service, because that is a master's duty, and it is manifest that that line of cases does not control the question here. Here we have negligence charged not in the machinery or appliances, but in giving an order by one in general charge of the work, and the question turns upon the relation of the master to the foreman, and his relation to appellee. Suppose the foreman had pried off the brace, could it then be insisted that he was not a fellow servant in doing the general work? Can it be any more the case when he directs another to do it? In other words, does the fact of the giving of the order raise him to a higher relation than doing it manually? It was said in *Thacker v. Chicago, etc., Co.* (1902) 159 Ind. 82, 85, 64 N. E. 605, 607 (59 L. R. A. 792): "In this state, there is a clear distinction between a superior servant and a vice principal. A superior servant is generally one who has authority to direct and control other servants, and may or may not be charged with any of the duties which the master owes his servants." In *Dill v. Marmon* (1905) 164 Ind. 507, 515, 73 N. E. 67, 70 (69 L. R. A. 163), it was said: "Notwithstanding the view which this court has sanctioned as to the liability of the master to a servant for the negligence of an employee who is over the whole service, or over a large department of it, yet it has never given any recognition to what is termed the 'superior servant' doctrine. On the contrary, it has always maintained that the master was not liable for the act of a mere foreman in giving directions concerning the work to a servant working under him, where the place and appliances furnished by the master were proper"—citing numerous cases. "In the case last cited (*Southern, etc., Co. v. Harrell* [1904] 161 Ind. 68) [68 N. E. 262, 63 L. R. A. 460] it was pointed out that the master's duty relative to furnishing a safe place to work does not require in undertakings which may be intrusted to a foreman and the men under him that the master shall guard the men against those transient dangers, which from time to time occur in the progress of the work," and quoting from *Southern Co. v. Martin* (1903) 160 Ind. 280 [66 N. E. 886], "the whole matter was one of detail, that the foreman and the men might properly be permitted to attend to in their own way." The employer, however, is not liable to his employee for the negligence of his co-servants in respect to the details of the work, nor is he bound to protect his employee against the mere transitory perils that

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the execution of the work occasions. "The word 'place' in negligence cases usually means the premises where the work is to be done, and does not comprehend the negligent acts of fellow servants by reason of which the place is rendered unsafe or dangerous." The obligation resting upon a master to use due care to provide and maintain a safe place for his workmen does not extend to all the passing risks that may arise from short-lived causes." *Haskell Co. v. Przewdziankowski* (1907) 170 Ind. 10, 83 N. E. 626, 14 L. R. A. (N. S.) 972, 127 Am. St. Rep. 352.

It must be manifest that, in order that there should be a liability under the complaint in this case, it must appear that the foreman was acting in place of the master, discharging a master's duty, with respect to the alleged negligent order, and it is likewise manifest that the foreman was not discharging any duty owing by the master. It is not shown what if any authority the foreman had, except that of control, and direction of the manner of doing the work, and to hold that the complaint states a cause of action would be to hold that every superior servant in directing the manner of doing a specific work, in the line of a general employment is a vice principal, and creates a liability merely from his power of control, and direction of the work, and his negligence in doing so, and the very object, and purpose of the employer's liability act, owing to the hazards of train service, was to create that relationship under specified conditions by way of enlargement of the common-law liabilities. A superior servant cannot be said to be a vice principal in giving a negligent order in the progress of changing work, any more than it can be said that a master is liable where a qualified servant chooses a negligent manner of doing a specific work assigned to him. Either case would make the master an insurer. Broad allegations of power and authority to direct the work and control the men cannot control the specific allegations showing that the injury was occasioned by a negligent direction under the changing conditions under which the work was carried on by one who was not discharging the duties of the master, but those of a superior servant, in giving the direction. Two cases in which the proposition is tersely stated are found in *Flynn v. Salem*, 134 Mass. 351, and *Floyd v. Sugden*, 134 Mass. 563. See, also, *O'Niel v. Great Northern Co.* (1900) 80 Minn. 27, 82 N. Y. 1086, 51 L. R. A. 532, and *Tedford v. Los Angeles Co.* (1901) 134 Cal. 76, 66 Pac. 76, 54 L. R. A. 85; *Illinois, etc., Co. v. Josey* (1901) 110 Ky. 342, 61 S. W. 703, 54 L. R. A. 78, 96 Am. St. Rep. 455, and the valuable and extensive notes.

The petition for rehearing is overruled.

JOHNSON v. LAKE SHORE & M. S. RY. CO.

(Supreme Court of Michigan, July 14, 1910.)

[127 N. W. Rep. 271.]

Master and Servant—Injury to Servant—Incompetency of Fellow Servant—Liability of Master.*—The officers of a railroad company knowing that a freight conductor was addicted to the use of intoxicating liquors could not rely on his promise to reform, and though he was not thereafter discovered by them under the influence of liquor while on duty, it was their duty to learn how he conducted himself elsewhere, and thus learn that his habit of drinking to excess when off duty was notorious in the city where he lived, and in and about the place she frequented, and when they failed to do so the company was liable for an injury to another servant occasioned by the conductor when intoxicated while on duty.

Appeal and Error—Questions Reviewable—Weight of Testimony.—A verdict sustained by some testimony will not be disturbed, because it is not the province of the Supreme Court to weigh the evidence.

Master and Servant—Injury to Servant—Incompetency of Fellow Servant—Proximate Cause.—In an action against a railroad company for a personal injury inflicted by a freight conductor in consequence of his intoxication while on duty, the extent of his intoxication must be considered in determining his competency to do the particular thing causing the injury, and whether the consequences were due to accident or to his intoxication.

Master and Servant—Injury to Servant—Contributory Negligence.—When the extent of the intoxicated condition of a freight conductor while on duty was discoverable by a station agent assisting him in removing freight from a car, the station agent, in order to recover for injuries inflicted on him by the conductor, must ordinarily act with reference to such condition.

Error to Circuit Court, Jackson County; James A. Parkinson, Judge.

Action by Curtis P. Johnson against the Lake Shore & Michigan Southern Railway Company. There was a judgment for plaintiff, and defendant brings error. Affirmed.

Argued before OSTRANDER, HOOKER, MOORE, MCALVAY, and BROOKE, JJ.

*For the authorities in this series on the question whether a master is liable for injury to his servant resulting from the incompetency of another of his employees, see last foot-note of *Still v. San Francisco, etc., Ry. Co. (Cal.)*, 31 R. R. R. 680, 54 Am. & Eng. R. Cas., N. S., 680; fifth head-note of *Indianapolis T. & T. Co. v. Kinney (Ind.)*, 31 R. R. R. 264, 54 Am. & Eng. R. Cas., N. S., 264.

Johnson v. Lake Shore & M. S. Ry. Co

Boudeman, Adams & Weston, for appellant.

Richard Price, for appellee.

OSTRANDER, J. Plaintiff was for upwards of 13 years prior to November 6, 1907, the agent of defendant at its station at Brooklyn, Mich. On that day a car, a portion of a freight train running between Ypsilanti and Hillsdale, in charge of Conductor Charles A. Mills, was brought alongside of the station platform at Brooklyn for the purpose of unloading some freight. Conductor Mills and one or more other employees of defendant went into the car to remove the freight, and, as was the custom, plaintiff with the waybills entered and remained in the car to check the articles called for by said bills. It was dark enough so that lanterns were used. In removing a box, which he partly supported and rolled or turned from corner to corner in his progress from the end of the car to the open door in the center of the side of the car, Conductor Mills let the box fall upon plaintiff's foot. To recover damages for the injury to his foot so occasioned plaintiff brought this suit, and in his declaration alleged that Conductor Mills was a person addicted to the use of intoxicating liquors and in the habit of getting drunk, that he was upon the particular occasion under the influence of intoxicating liquor, that his condition made him unfit to perform his duties as conductor, and was the reason why he failed to properly handle and move the box which fell on plaintiff's foot, that defendant knew or should have known of the habits of said conductor, and that he had before that time been under the influence of liquor and intoxicated while in the performance of his duties as conductor, that it was negligence on the part of defendant to keep him in its employ. Plaintiff recovered a substantial judgment, which defendant seeks to reverse upon the ground that it was error for the trial court to refuse to direct a verdict for defendant; it being contended (1) that the testimony fails to show any negligent conduct on the part of Mills, (2) that it fails to show any negligence on the part of defendant in employing Mills and retaining him in employment, (3) that it was not proved that the intoxication of Mills, if he was intoxicated, was the cause of the falling of the box, (4) that plaintiff was not free from negligence contributing to his injury. It is stated in the brief for appellant that if it shall be determined that the case was one for a jury, the judgment should be affirmed.

It is admitted that in October, 1905, it was reported to a division superintendent of defendant that Mills had been drinking the day before, that Mills was interrogated upon the subject, admitted that he had drunk beer, denied that he was in the habit of drinking, and promised to amend. Defendant's train master also knew of this fact and testified that thereafter he observed

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Mills at various times when he was on duty, and did not discover that he had been using liquor. He had the matter in mind and knew of Mills' promise to "cut it out." The testimony tends to prove that he did not amend his conduct, and that before and after October, 1905, his habit of drinking liquor to excess when off duty was notorious in and about the places he frequented, and the city where he lived. It is said that the officers of defendant had the right to accept the promise of Mills and if he was not thereafter discovered under the influence of liquor, when on duty, it was not called upon to learn how he conducted himself when not on duty. The case is ruled, upon this point, by *Hilts v. Chicago, etc., R. Co.*, 55 Mich. 437, 21 N. W. 878.

There is some testimony tending to prove that Mills was under the influence of liquor upon the occasion in question. It is not very convincing, but the question of its weight is not before us. It is undoubtedly true that sober men, moving boxes, often lose control of them and let them fall. It may be assumed, however, that an intoxicated workman is less competent to manage even so small an affair as moving a box, than the same workman would be if sober. The extent to which he is intoxicated must always be considered in determining his competency to do a particular thing, and whether the consequences of his actions are due to accident or to his condition. To the extent that his condition was discovered by a fellow workman, the duty to act with reference to that condition would ordinarily be imposed. It is apparent that both the question of the cause of the injury and the one of the care to be exercised by plaintiff, under the circumstances, were questions of fact.

We are satisfied that we can determine none of appellant's contentions as matter of law, and the judgment is therefore affirmed.

GULF, C. & S. F. RY. CO. v. GASKILL.

(Supreme Court of Texas, June 15, 1910.)

[129 S. W. Rep. 345.]

Master and Servant—Injuries to Third Person—Servant Employed by Third Person.—Where defendant railroad company had control of the operation of cars on a switch maintained for the convenience of a compress company, defendant was liable for the negligence of those doing such work for it resulting in injury to a servant of the compress company, though those operating the cars were also the general servants of the compress company, except as to the operation of the cars.

Master and Servant—Injuries to Third Person—Fellow Servants.—The general servants of the compress company under such circumstances, while engaged in moving cars, would not be fellow servants of the servant injured engaged at the time in a different employment for the benefit of the compress company.

Master and Servant—Injuries to Third Persons—Relation of Parties—Question for Jury.—A contract between defendant railroad company and a compress company for the construction of a switch track stipulated that the track should belong to the railroad company, which should maintain and operate it in connection with the railroad, and should transfer or move cars loaded or empty to and from the plant. Certain of the servants of the compress company with the permission of the railroad company were in the habit of moving cars on the switch as occasion required, and while so doing negligently caused a collision resulting in injury to plaintiff, another servant of the compress company, engaged in other work. Held, that the contract did not as a matter of law impose an absolute duty on the railroad company to move the cars on the switch track at all events, and hence whether the compress company did the work with its servants or whether the railroad company through its agent did the work, directing and controlling it and employing for the purpose the services of those who in other things were the employees of the compress company, was for the jury.

Error to Court of Civil Appeals, Fourth Supreme Judicial District.

Action by C. R. Gaskill against the Gulf, Colorado & Santa Fe Railway Company. Judgment for plaintiff was affirmed by the Court of Civil Appeals (120 S. W. 557), and defendant brings error. Reversed and remanded.

Terry, Cavin & Mills and *A. N. Culwell*, for plaintiff in error.
R. J. Alexander and *Wilkinson & Lee*, for defendant in error.

WILLIAMS, J. The defendant in error, plaintiff below, who was superintendent of a compress at Ballinger, was hurt while

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attending to his business as such in a car of the plaintiff in error, defendant below, which stood upon the spur track by the cotton platform of the compress company through the negligence of other persons in driving another of defendant's cars against that in which plaintiff was. Those who moved the car were ordinarily the servants of the compress company alone, and the principal question in the case is whether or not the defendant is responsible for their negligence.

The spur track was constructed by the defendant to connect its road with the compress, under a contract with the compress company, stipulating that the former was to be its owner, and was to maintain and operate it in connection with the railroad, "and to transfer or move cars, loaded or empty, to and from said plant" of the compress company. The course of the business was for the defendant to put cars upon the spur to be unloaded or loaded and to be afterwards taken out for transportation. All other work about the compress and the spur was done by the plaintiff as superintendent and a corps of men under him employed by the compress company, except such as was done by one Rhodes, who was the only employee of the defendant having any connection therewith. As it became necessary to change the positions of cars upon the spur, they were moved with pinch bars by the hands in the employ of the compress company. Whether such movement and placing of cars was done under the direction and control of Rhodes as the employee of the defendant or under that of the compress company the evidence conflicts; that for the plaintiff tending to prove the former, and that for defendant tending to show the latter to have been the fact. The trial court seems to have regarded the conflict as immaterial, instructing the jury, in substance, that if the two cars were brought into collision through the negligence of the servants of the compress company, moving them by permission of the defendant, the latter would be liable as matter of law. The Court of Civil Appeals affirmed this view of the law of the case.

We cannot agree with the contention of counsel for plaintiff in error that the court should have directed a verdict for the defendant. If the fact be—as much of the evidence for plaintiff tends to show it—that the railroad company, through its employee Rhodes, and as a part of its work, controlled the moving of cars as it became proper to do so, it would be liable for the consequences of the negligence of those doing such work for it although in all although in all else they were the servants of the compress company. If it so employed them in its own work, under such conditions, it made them its servants for the time being. Nor could they be regarded, while so engaged, as the fellow servants of the plaintiff. He was doing the work of his

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employer alone and not of the defendant, in which, in the state of facts supposed, the others would be regarded as acting.

But neither can we agree with the view of the trial court and the Court of Civil Appeals, that, as matter of law and without regard to the question of fact just referred to, those operating the cars are to be regarded as having been servants or agents of the defendant. Even conceding for the purposes of the decision that the undertaking of the railroad company "to transfer or move cars, loaded or empty, *to or from* said plant," obligated it to move them from point to point on the spur after they had been put upon it as the convenience of the compress company in loading or unloading them might demand, it yet cannot be admitted that, if the latter company voluntarily undertook to do that work for itself with its own servants, it thereby made them the servants of the railroad company, when neither company nor the servants themselves contemplated or consented to such a change of relation. Such a conclusion, in the language of the opinion in *Railway v. Culberson*, 72 Tex. 375, 10 S. W. 706, 3 L. R. A. 567, 13 Am. St. Rep. 805, would rest on "a mere fiction not based upon any sound rule of law." In that case a question much broader and more important than that before us was involved, viz., whether or not a railroad company, which had leased its lines to another without authority of law, was responsible for the negligence of the lessee, actually operating the road, causing injury to a servant of the latter, and, although the opinion fully recognized the principle that by such a lease the owner of a railroad could not escape any of its duties to third persons or to the public at large, and is to be treated, despite the unauthorized lease, as operating the road through the lessee and as responsible for such operation, yet it was held that the principle has no application as between the lessor and employees of the lessee whose rights as employees arise out of and are dependent on contract with the latter, and that the responsibility of the lessor does not include that for negligence consisting only in the manner of such operation. While there is a conflict of decisions upon that question we are entirely satisfied with the soundness of the position of this court, and believe it to be upheld by the weight of authority. Many of the decisions on the subject are cited in *Elliott on Railroads*, §§ 466, 472.

In our opinion there would be less reason in this case for holding the railroad company liable to plaintiff, an employee of the compress company, for the negligence of other employees of that company, in fact acting as such, than there would be for holding a lessor of a railroad company who has permanently committed to a lessee the entire discharge of all its duties responsible to any one hurt by such operation whether servant or not.

Treating that which the employees of the compress company

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were in the habit of doing, when they moved cars from point to point on the spur track, as work which ought to have been done by the railroad company, it does not follow either as a legal construction or an implication of fact that, if the compress company, for its own convenience, undertook to do it with its servants, it and they thereby consented to become agents or servants of the railroad company and that it consented to accept them as such. The work was such as they might well have regarded as incidental either to the business of the compress company or to that of the railroad company, and there is no rule of law or consideration of public policy operating as between the two companies, that we can discover, denying to them the right to arrange the doing of such simple things as their own convenience or interests might dictate, and forcing upon them the relation of principal and agent or employer and employee without regard to any question as to the actual assumption of such relation.

But we think it by no means clear that the duty of moving the cars as was usually done was expressly imposed upon the railroad company by the contract. It undertook to move them "to and from" the plant. But we do not intend to decide the question just stated as matter of law. All that is necessary is to state, what seems obvious to us, that the language is such as to admit of further arrangement between the companies as to such movements as those in question and to embrace as within the intention of the contracting parties any course of action in regard thereto which may have grown up between them, and that this leaves the question of fact raised by the evidence and to be decided by the jury whether the compress company did the work with its servants, or whether the railroad company, through its agent, Rhodes, did it, directing and controlling it and employing, for the purpose, the services of those who in other things were only the employees of the compress company. The action of the trial court in taking that question from the jury was error, for which the judgment must be reversed.

Reversed and remanded.

MILTON'S ADM'X v. FRANKFORT & V. TRACTION CO.

(Court of Appeals of Kentucky, June 17, 1910.)

[129 S. W. Rep. 322.]

Master and Servant—Injuries to Servant—Fellow Servants—Street Railway Motorman.*—Motormen of colliding cars of a street railway system, though employed by the same company, are not fellow servants so as to preclude a recovery for injuries to one by the negligence of the other.

Master and Servant—Injuries to Servant—Fellow-Servant Rule.—In Kentucky there are two exceptions to the rule that all employees of a common master engaged in a common pursuit are fellow servants, viz., where a servant is injured by the gross negligence of another servant superior in authority to him, and where he is injured by the negligence of another servant in a different department or grade of employment.

Master and Servant—Death of Servant—Street Railway Collision—Contributory Negligence.—M., a street railway motorman operating a car ahead of that operated by decedent, left the car barn on time at 6:10 a. m. on the morning of the accident. After proceeding 1,300 feet from the barn at about 8 miles an hour, he discovered he had forgotten his fare box and started to return to the barn to procure it, having been out 3½ minutes. Decedent's car was not due to leave the car barn until 6:17, but decedent on going to the barn discovered that M. had left his box, and so he took the box and started to deliver it to M. at a point where he expected to meet him at 6:17. There was a heavy fog, and M. reached the point of collision not later than 6:14½ a. m.; the cars coming together with great force and so injuring decedent that he died. Held that, notwithstanding his negligence, decedent was also negligent in leaving the barn ahead of his schedule time, and hence there could be no recovery for his death.

Appeal from Circuit Court, Franklin County.

"To be officially reported."

Action by Robert Milton's administratrix against the Frankfort & Versailles Traction Company. Judgment for defendant, and plaintiff appeals. Affirmed.

*For the authorities in this series on the subject of the different department of limitation of the fellow-servant rule, see foot-note of *Meyers v. San Pedro, etc., R. Co. (Utah)*, 35 R. R. R. 21, 58 Am. & Eng. R. Cas., N. S., 21; last foot-note of *Konoski v. Delaware, etc., R. Co. (N. J.)*, 34 R. R. R. 78, 57 Am. & Eng. R. Cas., N. S., 78.

For the authorities in this series on the subject of the superior servant limitation of the fellow servant rule, see third foot-note of *Hallock v. New York, etc., Ry. Co. (N. Y.)*, 35 R. R. R. 332, 58 Am. & Eng. R. Cas., N. S., 332.

Milton's Adm'x v. Frankfort & V. Traction Co

Scott & Hamilton, W. C. Marshall, and J. H. Polsgrove, for appellant.

Hazelrigg & Hazelrigg, for appellee.

CLAY, C. Robert Milton, a motorman in charge of one of appellee's cars, was injured in a collision which occurred on January 5, 1907, between his car and another of appellee's cars, and died the next day. His widow, Elizabeth Milton, qualified as his administratrix and brought this suit against appellee to recover damages for the death of the decedent. Among the pleas interposed by the answer of appellee was one to the effect that the decedent was a fellow servant of the motorman in charge of the other car. The trial court sustained a demurrer to this paragraph of the answer. Later on in the trial this action was reconsidered and the demurrer overruled. At the conclusion of all the testimony the jury instructed peremptorily to find for appellee. From the judgment based upon this finding this appeal is prosecuted.

The facts in the case are as follows: Appellee's car barn and power house are situated on North Wilkerson street in Frankfort, Ky. From that point the three cars which were then in use were taken out in the morning by the motormen. There were no conductors on the cars; each motorman was in sole charge. The employees at the power house exercised no control over the motormen, and had nothing to do with directing them when to start; their duty was to get the cars out of the barn and place them at the disposal of the motormen. Each motorman was furnished with a time-table or schedule which fixed the time of his departure from the barn and the time of his arrival and departure at the various meeting points in the city. Before departing on his run, each motorman would take with him his fare box. According to the schedule then in force, the time of departure from the barn of the three cars in use was as follows: The first car, which was in charge of a motorman by the name of Semones, left at 6:05 a. m.; the second car, which was in charge of a motorman by the name of McQuillan, left at 6:30 a. m.; the third car, which was in charge of the decedent, was due to leave at 6:17 a. m. On the morning of the accident there was a heavy fog, and it was possible to see only a short distance. McQuillan, whose car collided with that of the decedent, swears that he left the barn on time, at 6:10 a. m. After proceeding about 1,300 feet from the barn, at the rate of about 8 miles an hour, he discovered that he had forgotten his fare box. He brought his car to a stop, reversed the trolley pole with the assistance of a passenger, and proceeded on his way back to the car barn. On his return trip he ran his car at about 15 miles an hour. He states that when he discovered that his fare box was missing he had been out about 3½ minutes. It was 7 min-

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utes from the time of his departure until Milton was due to leave. As he was running at 15 miles an hour, he could return the 1,300 feet in about 1 minute. This would give him ample time to reach the car barn before the departure of Milton. He was due at Norman's corner at 6:17 a. m. By proceeding at the same rate, he could have reached that point on time. In the meantime, Milton, on going to the barn, discovered the fact that McQuillan had left his fare box. He took the fare box and stated that he would deliver it to McQuillan at Norman's corner, where McQuillan was due to arrive at 6:17 a. m. James Montgomery, the engineer at the power house, states that McQuillan had been gone 1 or 2 minutes when Milton started. Ira Hulett, another employee at the car barn, states that McQuillan had been gone 3 or 4 minutes when Milton started. There is no conflict in the evidence upon this point. When we consider the statements of Montgomery and Hulett, in connection with the statement of Milton, himself, that he would deliver the fare box to McQuillan at Norman's corner where McQuillan was due at 6:17 a. m., and in connection with McQuillan's statement that he had been out of the barn only 3½ minutes when he started on his return trip, and that he must have reached the point of collision within less than 4½ minutes after 6:10 a. m., there can be no doubt that Milton departed from the barn before he was scheduled to leave. At the time of the accident, Milton was running his car at 4 or 5 miles an hour. He did not reverse the current prior to the accident. McQuillan says that he could not see Milton's car on account of the fog. Suddenly he saw the light in front of him. He immediately reversed the current and jumped from his car in time to avoid serious injury, although he was slightly injured. The cars came together with great force. McQuillan's car was knocked from its trucks, and the front of Milton's car was demolished. Milton was fatally injured, and died the next day.

We are inclined to the opinion that the court erroneously held that Milton and McQuillan were fellow servants. This court has never adopted the fellow-servant doctrine announced in the cases of *Priestly v. Fowler*, 3 M. & W. 1, 6, and 7, and *Farwell v. Boston, etc., R. R. Co.*, 4 Metc (Mass.) 49, 38 Am. Dec. 339. The courts following the rule announced in those cases have held all employees of a common master engaged in a common pursuit to be "fellow servants." In this state two exceptions to this rule have been recognized: First, where the servant is injured by the gross negligence of another servant superior in authority to him; second, where the servant is injured by the negligence of another servant in a different department or grade of employment. Following this rule, this court has held that employees composing the crew of one train are not fellow

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servants of the employees composing the crew of another train. *Kentucky Central Ry. Co. v. Ackley*, 87 Ky. 278, 8 S. W. 691, 10 Ky. Law Rep. 170, 12 Am. St. Rep. 480; *C., N. O. & T. P. Ry. Co. v. Hill*, 89 S. W. 523, 28 Ky. Law Rep. 530; *L. C. & L. R. R. Co. v. Cavens*, 9 Bush, 559. The reason for the rule is aptly stated in the case of *Louisville & Nashville R. R. Co. v. Brown*, 127 Ky. 732, 106 S. W. 795, 32 Ky. Law Rep. 552, 13 L. R. A. (N. S.) 1135, where the court said: "But when the servant is injured by employees of the same master, who are not directly associated with him, and with whom he is not immediately employed, and whose qualifications for the place they occupy he has no means of knowing, and in whose selection he has no voice, and over whose conduct and actions he has no control, and against whose negligence and carelessness he cannot protect himself, he may recover damages from the master for injuries received through their negligence, whether it be ordinary or gross, and without any reference to the position or place the servant causing the injury holds." If this be the basis of the rule, we can see no good reason why a distinction should be made between employees on different trains and employees on different street cars. Employees upon one car are not directly associated with those upon another car; they simply pass each other occasionally. Their duties do not require immediate co-operation, and do not bring them together or into such relations that they can exercise an influence upon each other promotive of proper caution. *Louisville Ry. Co. v. Martin Hibbitt* (opinion delivered June 7, 1910) 129 S. W. 319. We therefore conclude that Milton was not a fellow servant of McQuillan, who was in charge of another car.

This ruling, however, is not conclusive of appellant's right to recover. There is no evidence in the case tending to show that Milton left on schedule time. On the contrary, the testimony of the witnesses and every circumstance of the case go to show that he left the barn ahead of his schedule time, and was running ahead of his schedule time at the place of the accident. In doing this he was negligent, and assumed the risk. As McQuillan had no reason to anticipate that Milton would leave before his schedule time, it is doubtful if he was negligent, either in returning or in running his car at a high rate of speed, so far as Milton, himself, was concerned. But admitting that McQuillan was negligent, the accident would not have occurred had it not been for Milton's negligence in leaving the car barn ahead of his schedule time. The rule is well settled that, where the injury complained of was caused by his own negligence, it will defeat a recovery, although the person committing the injury may also have been negligent. *Hummer v. Louisville & Nashville R. R. Co.*, 128 Ky. 486, 108 S. W. 885, 32 Ky. Law Rep. 1315; *Louisville & Nashville R. R. Co. v. McNary*, 128

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Ky. 408, 108 S. W. 898, 32 Ky. Law Rep. 1266, 17 L. R. A. (N. S.) 224. In such a case, however, the burden is upon the defendant to show the contributory negligence on the part of the plaintiff. Thus in the recent case of *C., N. O. & T. P. Ry. Co. v. Yocum's Adm'r*, 123 S. W. 247, it was Yocum's duty to keep informed as to the movements of all overdue trains and the time of the regular trains, as well as the presence of extra trains upon the track he was about to use. It was also his duty to provide himself a red flag and torpedoes, and at night to display a red and white light while on the track. If he saw a red signal light, which indicated that there was a train approaching from the opposite direction, it was his duty to remove his tricycle from the track and look and listen, and, if there was no sound to indicate an approaching train, to proceed on foot to the signal and examine it and see if it was in proper working order. The red signal light was in proper condition. The evidence showed that he failed to perform any of his duties with respect to that light. Notwithstanding the fact that there was some evidence tending to show that the headlight of the engine, which struck Yocum and killed him, was not burning, this court held that Yocum's own negligence would preclude a recovery. The principle therein announced is applicable to the facts of this case. The undisputed testimony shows that Milton was negligent in leaving the barn before his schedule time. Had he not done so, he would not have been killed. There being no conflict in the evidence upon this point, the question is not one of fact, but of law to be determined by the court. *Louisville & Nashville R. R. Co. v. Mounce*, 90 S. W. 956, 28 Ky. Law Rep. 933.

We are of the opinion that the trial court properly instructed the jury to find for appellee.

Judgment affirmed.

LORICK & LOWRANCE, Inc., v. SOUTHERN RY. CO.

(Supreme Court of South Carolina, Sept. 26, 1910.)

[68 S. E. Rep. 931.]

Railroads—Right of Way—Abandonment—Nonuser.*—Abandonment by a railroad of a right of way may not be inferred from mere nonuser for 20 years, unless the circumstances indicate an intention not to make any further use thereof.

Eminent Domain—Right of Way—Abandonment—Nonuser.*—Civ. Code 1902, § 2194, providing that a right of way shall vest in the corporation so long as the same may be used for the purposes of the railroad and no longer, prohibits a railroad company on pain of forfeiture from using for private gain land which it acquired under the right of eminent domain for a public use, but, to destroy the right, there must be either a use separate or distinct from railroad purposes or nonuser for railroad purposes, under circumstances indicating an intention to abandon the right of way.

Appeal from Common Pleas Circuit Court of Richland County; R. W. Memminger, Judge.

Action by Lorick & Lowrance against the Southern Railway Company. From a judgment for defendant, plaintiffs appeal. Affirmed.

Lyles & Lyles, for appellant.

Thomas & Lumpkin, for respondent.

WOODS, J. The plaintiff being the owner of a square of land in the city of Columbia containing four acres, bounded by Rice, Bull, Marion, and Tobacco streets, brought this action to enjoin the Southern Railway Company from using an old right of way across the land on the ground that the right to the easement had been abandoned and lost by nonuser. The issue submitted to the jury was "whether at the time of the commencement of this action the Southern Railway Company was entitled to a right of way over the four acres of land described in the complaint along the line of the old Charlotte & South Carolina Railway track, and, if so, of what width." The evidence showed beyond dispute that the Charlotte & South Carolina Railway Company owned a right of way over the land 130 feet wide acquired in 1850, and that the defendant is successor to the right and title of the Charlotte & South Carolina Railway Com-

*For the authorities in this series on the question, what constitutes an abandonment of a railroad right of way, see foot-note of *Enfield Mfg. Co. v. Ward* (Mass.), 19 R. R. R. 600, 42 Am. & Eng. R. Cas., N. S., 600; third head-note of *Stannard v. Aurora, etc., Ry. Co.* (Ill.), 18 R. R. R. 685, 41 Am. & Eng. R. Cas., N. S., 685.

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pany. There was evidence tending to show that, owing to change in track arrangement, the right of way over this lot of land had not been used for 20 years; but there was no evidence of adverse use by any owner of the servient estate of land embraced in the right of way for the statutory period of 10 years. The verdict on the issue submitted was in favor of the defendant. The circuit judge by his decree approved this finding, and, in refusing the injunction and dismissing the complaint, adjudged the Southern Railway Company to be entitled to a right of way over the land 120 feet in width.

The exceptions assign error in the instructions to the jury on the issue whether the right of way had been abandoned by the railroad company. The charge, in substance, was that abandonment of the right of way could not be inferred from mere nonuser for 20 years, unless the circumstances indicated an intention not to make any further use of the easement. This instruction was in accordance with the law thus laid down in *Polson v. Ingram*, 22 S. C. 541: "It will be observed that the question of abandonment is a very different question from having the easement defeated and divested by the adverse use of another. This last question is to be determined by the character of the adverse use and how long continued, while the former depends upon the intention of the party in possession, without regard to the claims of others. Such being the law, it would have been error for the judge to have charged, as a direct and positive proposition, 'that 20 years' nonuser will presume the abandonment of an easement.'" The rule thus stated is one of general recognition except when altered by statute. 33 Cyc. 221; *Orr v. O'Brien*, 77 Iowa, 253, 42 N. W. 183, 14 Am. St. Rep. 282, and note; *Trimble v. King*, 131 Ky. 1, 114 S. W. 317, 22 L. R. A. (N. S.) 881, and note.

The plaintiff insists, however, that the charter statute under which the Charlotte & South Carolina Railway Company acquired this right of way alters the rule, in that it enacts with respect to the right of way, "The said company shall have good right and title thereto and shall have, hold and enjoy the same as long as the same may be used only for the purposes of the said road and no longer," etc. The same provision is found in section 2194 of the Civil Code of 1902, relating to rights of way acquired under the general condemnation statute. The design and meaning of these enactments is that the railroad company should be prohibited on pain of forfeiture from using for private gain land which it was permitted to acquire under the state's right of eminent domain for a use in which the public is concerned. The statutes cannot be tortured into meaning so unreasonable a thing as that any temporary nonuser of the right of way without purpose of abandonment shall destroy the easement. To destroy the right

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under these statutes, there must be shown either a use separate and distinct from railroad purposes or nonuse for railroad purposes under such circumstances as to indicate an intention to abandon the right of way. *Southern Railway v. Beaudrot*, 63 S. C. 266, 41 S. E. 299.

It is the judgment of this court that the judgment of the circuit court be affirmed.

SCHOEN v. CHICAGO, ST. P., M. & O. RY. CO. *et al.*

(Supreme Court of Minnesota, July 29, 1910.)

[127 N. W. Rep. 433.]

Master and Servant—Fellow Servants—Injuries to Servant—Contributory Negligence—Evidence—"Operation of Railroad"—Acts Constituting.*—Defendants, a railway company and a brewing company, respectively, entered into a contract with each other whereby for a fixed rental the railway company furnished to the brewing company a locomotive for the exclusive use of the brewing company in a yard containing tracks and switches, the ties and rails for which were owned by the railway company and the real estate by the brewing company. The engineer and fireman operating the locomotive were selected by the railway company and paid by the brewing company. Held:

(1) The operation of the yards and locomotive was a joint enterprise of the defendants directly connected with their respective activities.

(2) The maintenance and operation of such yard is the operation of a railroad, as defined by section 2042, Rev. Laws 1905, and the common-law rule as to the nonliability of the master for personal injuries received by an employé through the negligence of a fellow servant does not apply, where such injury is received because of exposure to a hazard peculiar to railroads.

(3) One who is run down by a locomotive upon a railroad track is injured as the result of exposure to a railroad hazard.

(4) The railroad yard was maintained jointly by the defendants. The plaintiff, a janitor for the adjacent buildings of only one of the

*See foot-note of *Hoveland v. Chicago, etc., Ry. Co.* (Minn.), 35 R. R. R. 786, 58 Am. & Eng. R. Cas., N. S., 786; foot-note of *Texarkana & Ft. S. Ry. Co. v. Anderson* (Tex.), 33 R. R. R. 351, 56 Am. & Eng. R. Cas., N. S., 351.

For the authorities in this series on the question whether employees of different companies may be fellow servants of each other, see foot-note of *Stever v. Ann Arbor R. Co.* (Mich.), 35 R. R. R. 337, 58 Am. & Eng. R. Cas., N. S., 337; second head-note of *Welch v. Boston & M. R. R.* (Mass.), 35 R. R. R. 35, 5 Am. & Eng. R. Cas., N. S., 35; third head-note of *Floody v. Chicago, etc., Ry. Co.* (Minn.), 34 R. R. R. 133, 57 Am. & Eng. R. Cas., N. S., 133.

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defendants, and under the exclusive control of that defendant, was not a fellow servant of the men in charge of the yard locomotive.

(5) Evidence considered, and held not to show that plaintiff was conclusively guilty of contributory negligence as a matter of law.

(Syllabus by the Court.)

Appeal from District Court, Ramsey County; Olin B. Lewis, Judge.

Action by Max Schoen against the Chicago, St. Paul, Minneapolis & Omaha Railway Company and another. Judgment for defendants, and plaintiff appeals from an order denying a new trial. Reversed, and new trial ordered.

H. A. Loughran, for appellant.

James B. Sheean, for respondent Chicago, St. P., M. & O. Ry. Co. *How, Butler & Mitchell*, for respondent Hamm Brewing Co.

O'BRIEN, J. Plaintiff was employed as janitor by defendant brewing company, and was run over by a switch engine owned by the defendant railway company where certain tracks devoted exclusively to the use of the brewing company crossed Reaney street, a public street of St. Paul. The brewing plant consisted of several buildings, some of which were separated by public streets. Between these buildings railroad tracks for the use of the brewing company had been constructed upon land owned by it; the track materials being the property of the railway company. The contract between these defendant companies in substance was that in consideration of a fixed rental the railway company furnished a switch engine for the exclusive use of the brewing company, selected the men to operate the same, whose wages were paid by the brewing company, and, further, the brewing company assumed all liability for injury caused by the operation of the engine. In the course of his duties the plaintiff was required to visit different buildings of his employer, and when injured was bringing from the office building to another building several rolls of paper which he had strung upon an iron band or hoop. He proceeded for some distance almost parallel with the tracks, intending to cross them at Reaney street and proceed to the building which was his destination. He testified that when he left the office building with the paper the engine was stationary, and when he was about 25 feet from the street he again looked and saw the engine stationary at the same point, which was behind him as he walked and about 135 feet from the street. Just as he reached the street and the first track, one end of the band slipped from his hand. He stooped to readjust the band, and was struck by the engine, which approached without any warning or signal, although the custom was to ring the bell upon the engine when it

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was moving in the yard. At the close of plaintiff's testimony a verdict in favor of each of the defendants was directed. Plaintiff appeals from an order denying a new trial as to both defendants.

Upon behalf of the railway company it is claimed that it is not responsible because the accident did not occur upon its right of way, and because the engine was leased to and under the control of the brewing company, and operated by the employees of that company. We cannot agree with this contention. The engine was its property, devoted to a special purpose, it is true, but for the benefit of the railway company, as well as for that of the brewing company, and clearly as a part of and in furtherance of the activities of both. The railway selected, and therefore to some extent controlled, the persons who operated the engine, which crossed and recrossed a public thoroughfare, and it could not by a private contract with the brewing company avoid its responsibilities to persons lawfully using the public streets. The most that can be claimed from the arrangement is that it was a joint enterprise, over which each defendant exerted some, but not exclusive, control, and therefore either or both may be liable.

2. Upon behalf of the brewing company it is claimed the plaintiff and those in charge of the engine were fellow servants, that the brewing company is not a railroad company, nor is it engaged in operating a railroad, and therefore is not liable to plaintiff for an injury received through the negligence of a fellow servant. Section 2042, Rev. Laws 1905, reads: "Every company owning or operating, as a common carrier or otherwise, a railroad, shall be liable for all damages sustained within this state by any agent or servant thereof, without contributory negligence on his part, by reason of the negligence of any other servant thereof. * * * How far the brewing company was authorized to operate a railroad is immaterial, if it in fact took part in such operation. The pertinent question is: Was the place where the accident happened a railroad yard, whether controlled and maintained by the brewing company alone, or jointly with the railway company? The tracks were railroad tracks, the engine a railroad engine, and the operations of both such as belong to and form part of the operations of every railroad system. We have no doubt, therefore, that the use of the tracks and engine for the purpose of moving freight cars to and from the brewery, as described in the testimony, was within the operation of a railroad and covered by section 2042. It follows from this that, if the defendants were joint operators of the yard, neither of them can escape liability to an injured person upon the ground that the injury resulted from the negligence of a fellow servant, if the injured employee was exposed to a railroad hazard. There can be no doubt of plaintiff's exposure to such hazard. *Tay v. W., S. & F. Ry. Co.*, 100 Minn. 131, 110

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N. W. 433; Mikkelson v. Truesdale, 63 Minn. 137, 65 N. W. 260; Nichols v. C., M. & St. P. Ry. Co., 60 Minn. 319, 62 N. W. 386.

3. In addition, we do not think the plaintiff was the fellow servant of those operating the engine. As already said, each of the defendants must be held to have participated in the operation of the yard and rolling stock. Each exercised some control over the enginemen. The plaintiff, however, was under the exclusive control of the brewing company. Plaintiff's duties and those of the enginemen were entirely unconnected, and it is at least very doubtful if they were fellow servants within the rule which exempts the master from liability for injuries sustained by the servant through the negligence of a coservant. We have no desire to extend that doctrine. It can only be invoked as to servants engaged in prosecution of a common enterprise and who are under identical control. While the specific duties performed by each may be different the enterprise and control must be identical. Wood's Master & Servant (2d Ed.) § 435; Floody v. C., St. P., M. & O. Ry. Co., 109 Minn. 228, 123 N. W. 815.

4. The final conclusion of the trial court was that plaintiff was guilty of contributory negligence. If he was negligent as a matter of law, neither of the defendants would be liable. Our conclusion, however, is that plaintiff's testimony did not conclusively establish negligence upon his part. In the performance of his duties plaintiff was required to cross the tracks. In doing so he proceeded for some distance practically parallel with the tracks upon a path commonly used by other persons upon the premises. This path gradually approached one of the tracks at the point where it crossed Reaney street, and, as we understand plaintiff's testimony, it was his intention, when he reached the walk crossing Reaney street, to cross the track upon the sidewalk at that point. When he left the building in which he had procured the rolls of paper, the engine was, according to his testimony, stationary at a point about 135 feet from the street. When he reached a point about 25 feet from the street, he had occasion to readjust the rolls of paper, and he again looked for the engine, and saw it still stationary at the same point. Without stopping or looking again, he traversed the 25 feet to the street, and just as he arrived at that point, which brought him practically upon the outer rail of the track, he again had some difficulty with the load he was carrying, and while stooping to readjust it was struck. He testified positively that no bell was rung or other warning given him of the approach of the engine.

A perplexing question is generally presented in case where one lawfully upon railroad tracks is run down by an engine or train also lawfully upon the track. In such cases it is generally apparent that scrupulous care upon the part of the injured person would have prevented the accident, and it is not always easy

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to say when the negligence of the injured person is for the jury. We have first the familiar cases requiring one approaching a public crossing to satisfy himself by proper precaution that he may go upon the track with safety. *Schnider v. N. P. Ry. Co.*, 81 Minn. 383, 84 N. W. 124. Again, there are those cases holding that an employee engaged at work upon a track may rely upon the custom and duty of those operating trains to warn him of their approach, and so, where no such warning is given, and the employee lawfully engrossed in his work is injured, he may recover. *Graham v. M., St. P. & S. S. M. Ry. Co.*, 95 Minn. 49, 103 N. W. 714. We are unable to see that this case falls entirely within either class. Plaintiff's view was open and unobstructed. His duties did not require him to be upon the track for any appreciable length of time, nor were they such as would engross his attention otherwise than would be the case with any pedestrian crossing the tracks upon Reaney street. The testimony, if true, established the negligence of the engineer in failing to give any signal of the engine's approach to the crossing. The engineer's view was also unobstructed. He could have seen the plaintiff; and in any event he was charged with notice that he was approaching a public street.

The pivotal question, therefore, is whether the plaintiff exercised reasonable care when he satisfied himself, while still 25 feet from the crossing, that the engine was stationary, and that he might cross the track in safety without again looking in the direction of the engine. In *Magliani v. Minn. Trans. Ry. Co.*, 108 Minn. 148, 121 N. W. 635, a workman lawfully traversing the railroad yard was run down and killed by an engine which was backing through the yard pulling several cars to which it was attached. The yard was open and unobstructed, as in this case. The evidence there was to the effect that the engineer did not see the man upon the track. In this case there is no evidence upon that question. In the *Magliani Case* there was no evidence that the deceased paid the slightest regard to the operation of the trains in the yard, and it was held that by the exercise of any ordinary care upon his part he would inevitably have seen the approach of the train. The difference between that case and the present one arises just at this point. This plaintiff testified he did see the engine when he was 25 feet from the crossing; that it was then stationary; that he believed, if the engine was moved, warning of that fact would be given by ringing the bell; and in reliance upon those circumstances he went forward upon the track. Under such testimony the jury should have determined whether plaintiff acted as would an ordinaly prudent person under those circumstances, or failed to do so and was guilty of contributory negligence. *Lewis v. C., St. P., M. & O. Ry. Co.* (filed July 22, 1910) 127 N. W. 180.

Order reversed, and new trial ordered.

WEST v. CHICAGO, B. & Q. Ry. Co.

(Circuit Court of Appeals, Seventh Circuit, April 19, 1910. Rehearing Denied June 10, 1910.)

[179 Fed. Rep. 801.]

Master and Servant—Master's Liability for Injury to Servant—Low Bridge over Railroad.*—In an action against a railroad company to recover for the death of a brakeman on a freight train who was killed in the night while on top of the cars in the course of his duty by his head striking an overhead bridge, proof that the clearance between the rails and such bridge was more than two feet less than the standard or usual clearance maintained by the company in case of such permanent overhead structures made a prima facie case of negligence against the defendant, which could only be met by proof of a necessity which could not reasonably be avoided, and which was not conclusively overcome by evidence that the bridge was for a highway crossing, and that when it was rebuilt some time before the highway commissioners objected to its being raised because of the steepness of the approaches, it not being shown that such objection could not have been overcome by also raising the approaches nor that it was impracticable to do so.

Master and Servant—Action for Injury to Servant—Questions for Jury.—Where there was direct and positive testimony of apparently disinterested and reputable witnesses that "telldales" to give warning of the approach to the bridge, which had been taken down six weeks before, had not been replaced at the time of the injury, although contradicted, the question was one for the jury.

Master and Servant—Assumption of Risk—Railroad Brakeman—Low Bridge.†—To charge a railroad brakeman with assumption of the risk of injury from a low overhead bridge, by which he was struck and killed, it must be shown that he had either actual or constructive notice, not only of the existence of the bridge, but of the fact that it was so low as to be dangerous, and also that the circumstances at the time of the injury were such as not to excuse a reasonably prudent person from having the memory of the peril within the immediate field of his consciousness.

Master and Servant—Assumption of Risk—Railroad Brakeman—Low Bridge.†—The maintaining by a railroad company of an over-

*For the authorities in this series on the subjects of the duties and liabilities of a railroad, as an employer, with respect to objects or structures over or too near its tracks, see fourth paragraph of second foot-note of *Thomas v. Wisconsin Cent. Ry. Co.* (Minn.), 33 R. R. R. 609, 56 Am. & Eng. R. Cas., N. S., 609.

†For the authorities in this series on the question whether railroad employees assume the risks from structures or objects over or near tracks, see foot-note of *Louisville & N. R. Co. v. Hahn's Adm'r* (Ky.), 33 R. R. R. 603, 56 Am. & Eng. R. Cas., N. S., 603; second paragraph of first foot-note of *Norfolk & W. Ry. Co. v. Beckett* (C. C. A.), 29 R. R. R. 795, 52 Am. & Eng. R. Cas., N. S., 795.

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head bridge so low that it will strike a brakeman when standing or walking on the top of passing freight cars in the course of his duty, unless reasonably unavoidable, is negligence per se, and the company cannot charge its brakemen with assumption of the risk as matter of law by publishing rules giving them notice generally that bridges will not clear a man on top of high cars and to look out and guard themselves accordingly.

Master and Servant—Assumption of Risk—Railroad Brakeman.—The posting of a notice on a bulletin board by a railroad company that the "telldales" were down at a certain overhead bridge cannot charge a brakeman with assumption of the risk therefrom as a matter of law in the absence of evidence that he had actual notice or knowledge.

Master and Servant—Injury of Railroad Brakeman by Low Bridge—Contributory Negligence.‡—A brakeman on a freight train who was struck and killed by a low bridge at which there were no telldales, while proceeding along the tops of the cars in the night during a storm, held not chargeable with contributory negligence as matter of law.

Words and Phrases—"Telldales."—"Telldales" are ropes suspended from a wire across the track to give warning of a low bridge.

Error to the Circuit Court of the United States for the Southern District of Illinois.

Action by Stella F. West, administratrix of the estate of Henry W. West, deceased, against the Chicago, Burlington & Quincy Railway Company. Judgment for defendant, and plaintiff brings error. Reversed.

E. J. King, for plaintiff in error.

O. V. Miles, for defendant in error.

Before GROSSCUP, BAKER, and SEAMEN, Circuit Judges.

BAKER, Circuit Judge. The action was for damages on account of the company's alleged wrongful causing of West's death. At the conclusion of the evidence the court directed a verdict for the company.

West, a freight brakeman on one of the company's trains, while passing on a stormy night from the engine back over the tops of the box cars to examine the hand brakes in the performance of his duty at the time, stepped from an ordinary box car to a furniture car, and there was struck on the back of the head by the girder of an overhead bridge and killed.

‡For the authorities in this series on the subject of the contributory negligence of railroad employees injured by structures or objects over or near tracks, see third paragraph of first foot-note of *Norfolk & W. Ry. Co. v. Beckett* (C. C. A.), 29 R. R. R. 795, 52 Am. & Eng. R. Cas., N. S., 795, first foot-note of *St. Louis, etc., R. Co. v. Phillips* (Ala.), 35 R. R. R. 792, 58 Am. & Eng. R. Cas., N. S., 792.

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Negligence was charged in the lack of sufficient clearance and also of "telldales" (ropes suspended from a wire across the track) to give warning of the low bridge.

Evidence is in the record tending to prove that the bottom of the girder was 19 feet 8½ inches above the rails; that ordinary box cars are 12 feet high; that the furniture car in question was 14 feet 1 inch; that West was 6 feet tall in his shoes; that the company maintained this bridge as an overhead highway crossing; and that the company had a standard or usual clearance of 22 feet between track and permanent overhead structures. This was sufficient to make a prima facie case under the first charge of wrongful conduct. The ways of these great roads of commerce are maintained for the indefinite future. To erect permanent structures in such locations and relations that employees when discharging their duties are likely to be killed indicates an almost wanton disregard of human life. Under its denial the company did not conclusively overcome the prima facie showing. Such a death trap is not to be excused except by a necessity that cannot reasonably be avoided. The bridge foreman testified that when an old bridge at this location was replaced by the present one it was the intention to raise the new bridge, but the commissioners objected because the grade of the approaches would be too steep. There was no proof that the commissioners objected to the raising of the bridge if the company would also raise the approaches, nor what the cost of filling the approaches would be. A civil engineer testified that the track was upgrade both ways from the bridge and that while the clearance could be made sufficient by lowering the track "the grade would have to be carried out so far I should say it would be impracticable." Physical practicability was thus admitted; and, there being no evidence of how far the grade would have to be extended nor of the cost, the jury were not bound to accept an unsupported opinion that the change was financially impracticable. There was no proof to establish conclusively that the expense was beyond what a master of ordinary prudence would incur, first, out of regard for the safety of his employees; and, second, to save the damages that would accrue throughout the existence of the death trap in all cases where assumption of risk or contributory negligence could not successfully be used in defense.

For about six weeks before the accident the telldales were down. Six witnesses, mainly farmers residing near this highway crossing, testified that the telldales were not put up until after West was struck. The bridge crew and the section men, 14 in all, testified that the telldales were restored the second day before the injury. Furthermore, records of the work done by the bridge crew and telegraph messages sent over the company's wires from the bridge boss to his superintendent telling the

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daily whereabouts of the crew, were introduced. These corroborated the men's testimony. Thereon counsel for the company insist that the evidence of the plaintiff was so slight in comparison with that of the company that the court was justified in directing the verdict. The records and messages were at all times in the custody of the company's men who would naturally have an interest in freeing themselves and the company from blame. And while there was no direct attempt to impeach the company's men and records, the ultimate fact was squarely contradicted by the positive and circumstantial testimony of apparently disinterested men whose reputation for truthfulness was unassailed. Although from our study of the record the company's evidence appears much the stronger, we are of the opinion that this question of fact, involving the reliability of the evidence offered pro and con, should have been submitted to the jury, if the case was otherwise submissible.

With evidence sufficient to go to the jury upon the questions of the company's negligence respecting clearance and telltales, it was incumbent upon the company, in order to warrant a directed verdict, to establish affirmatively and conclusively either that West had assumed the risks or that he negligently contributed to his injury.

Assumption of risk of injury by the low bridge: From the teaching in *Hough v. Rld. Co.*, 100 U. S. 213, 25 L. Ed. 612, that a railroad company's negligence in building and maintaining its tracks and appurtenant structures "is not a hazard usually or necessarily attendant upon the business" nor one "which the servant, in legal contemplation, is presumed to risk" it is apparent that West, by the act of entering the service, did not agree to take upon himself the danger of the negligent lack of clearance. When, if ever, did he assume the risk?

West, 25 years old, had had 4 years' experience as a brakeman. For 2 years he had worked on this division. During several months preceding his death the trains on which he worked had passed under this bridge about 20 times a month. The fatal occasion was in the middle of the night. How often the trains on which he worked passed under this bridge in the daylight was not shown. If it might be inferred that some of his trains passed in daytime, still there was no evidence that he was ever in a position on the trains where he could see the bridge. If it might be inferred that he had noticed the bridge, that would be far from establishing that he had ever apprehended the danger arising from its presence. The record contains no evidence that any one had informed him of the particular danger, nor any statement or admission that he knew of it. The knowledge, actual or constructive, that must have been brought home to West was not merely knowledge that there was

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an overhead bridge in this locality, but knowledge of the danger that would arise at the instant when a tall man standing erect on a high car in a moving train was about to pass under the bridge. *Rld. Co. v. McDade*, 191 U. S. 64, 24 Sup. Ct. 24, 48 L. Ed. 96; *Ry. Co. v. Swearingen*, 196 U. S. 51, 25 Sup. Ct. 164, 49 L. Ed. 382; *Hawley v. Ry. Co.*, 133 Fed. 150, 66 C. C. A. 216; *Ry. Co. v. Beckett*, 163 Fed. 479, 90 C. C. A. 25; *Ry. Co. v. Cowley*, 166 Fed. 283, 92 C. C. A. 201.

As bearing on the question of West's knowledge of the danger arising from this low bridge, a time table was introduced which bore this print:

"Every man in the employ of the company that is in the train and engine service should have a copy of these time-table rules on hand. * * * Overhead bridges will not clear a man standing on top of high cars. Employees must look out for and guard themselves accordingly."

If this rule is to be construed as a notice that the company had been and intended to continue to be negligent in the construction of overhead bridges, and as a requirement that employees, without having any particular defect called to their attention, should hunt for and at their peril find all the defects, the rule is void as being an attempted abandonment of the company's duty and an attempted destruction of the employees' right to rely upon the belief that the company's duty has been faithfully performed until notice of failure in some particular is brought home to them—void as against public policy—just as void as the efforts in bills of lading to compel shippers to assume the carrier's negligence in transportation. As an attempted notice of the particular danger at this particular place, the rule manifestly falls short. And there was no direct proof that West had knowledge of the rule. If it might be inferred from the company's custom of furnishing its brakemen with copies of the time tables that West had been provided with a copy, the inference is not conclusive.

But, concerning permanent obstructions (the maintenance of which, unless reasonably unavoidable, is negligence per se), we think a further principle is involved, namely, that in law an employee is not bound at his peril to keep his consciousness continually charged with memories of the locations and relations of such obstacles, and that his engrossment in his duties at the time may excuse his failure to recall the impending peril. *Shearman & Redfield on Negligence* (4th Ed.) § 198; *Dorsey v. Construction Co.*, 42 Wis. 583. So, assumption of risk being a matter of defense, it would be necessary for the company to establish not merely that West at some former time had apprehended the danger, but also that the circumstances at the time of the injury were such as not to excuse a reasonably prudent

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person from having the memory of the peril within the immediate field of his consciousness.

Assumption of risk from the absence of telltales: On this, the record contains the further evidence that a written notice that the telltales were down was posted on a bulletin board, and that the matter was a frequent topic of conversation among the trainmen. But there was no direct proof that West had knowledge either of the written notice or of the talk. If knowledge might be inferred, it would not be the only inference on that subject that would be warranted by a consideration of all the circumstances in the record.

We are not now saying, with respect to either the lack of clearance or of telltales, that 12 reasonable men, under proper instructions from the court, might not properly find that a prudent person, circumstanced as was West, would have known of the dangers before stepping on the high car and would either have kept off or gone ahead knowingly at his own risk. But as different inferences of ultimate facts were fairly deducible from the state of the evidence, the question of assumed risk should have been submitted to the jury.

Contributory negligence: During a storm in the night, while discharging an immediate duty. West was proceeding along the tops of the cars. We can find nothing in the circumstances on that occasion that would have compelled the jury to find as the only legally permissible finding of fact that any danger was so obvious and imminent that a reasonably prudent person would not have acted as West did.

The judgment is reversed, with the direction to grant a new trial.

LONG POLE LUMBER CO. *v.* GROSS.

(Circuit Court of Appeals, Fourth Circuit, July 14, 1910.)

[180 Fed. Rep. 5.]

Master and Servant—Injuries to Servant—Railroads—Construction—Negligence—Question for Jury.—In an action for injuries to an engineer on a logging road by the collapse of a trestle, whether defendant exercised due care in the construction of the trestle was for the jury.

Master and Servant—Injuries to Servant—Safe Place to Work—Railways.*—The duty of a master to maintain a safe place to work, which in the case of a railway means a safe roadbed, etc., applies to every railway, of whatever description, including a logging road.

Pleading—Issues and Proof—Variance—Objections—Time.—An objection that there was a variance between the pleading and proof when first made after verdict is too late under the laws of Virginia.

Master and Servant—Injuries to Servant—Railroads—Engineers—Assumed Risk.†—While a locomotive engineer assumes such risks as are open and obvious, including risks incident to patent defects in the machinery, he does not assume the risk of latent, unobservable defects including the dangers incident to running over a defective bridge which had been improperly constructed, and was in disrepair.

Master and Servant—Injuries to Servant—Railroads—Defective Bridge—Knowledge of Danger—Instructions.—Where, in an action for injuries to an engineer by reason of the collapse of a bridge improperly constructed and in disrepair, defendant claimed that plaintiff had been instructed to examine all trestles along the road before

*For the authorities in this series on the subject of logging railroads, see *Eastern & W. Lumber Co. v. Rayley* (C. C. A.), 29 R. R. R. 590, 52 Am. & Eng. R. Cas., N. S., 590; second foot-note of *Barrow v. Lewis Lumber Co.* (Idaho), 29 R. R. R. 454, 52 Am. & Eng. R. Cas., N. S., 454.

†For the authorities in this series on the question whether trainmen assume the risk from defect tracks, roadbeds, bridges, etc., see third paragraph of first foot-note of *Laughy v. Bird & Wells Lumber Co.* (Wis.), 31 R. R. R. 242, 54 Am. & Eng. R. Cas., N. S., 242.

For the authorities in this series on the subject of the general principles involved in the doctrine of assumption of risks by railroad employees, see first foot-note of *Ross v. Chicago, etc., Ry. Co.* (Ill.), 35 R. R. R. 41, 58 Am. & Eng. R. Cas., N. S., 41; *Vaillancourt v. Grand Trunk Ry. Co.* (Vt.), 33 R. R. R. 353, 56 Am. & Eng. R. Cas., N. S., 353.

For the authorities in this series on the question whether a servant assumes risks arising from the negligence of his master or his representatives, see first foot-note of *St. Louis, etc., Ry. Co. v. Hawkins* (Ark.), 35 R. R. R. 46, 58 Am. & Eng. R. Cas., N. S., 46; seventh head-note of *St. Louis, etc., Ry. Co. v. Corman* (Ark.), 35 R. R. R. 48, 58 Am. & Eng. R. Cas., N. S., 48; first head-note of *Silvia v. New York, etc., R. Co.* (Mass.), 34 R. R. R. 74, 57 Am. & Eng. R. Cas., N. S., 74.

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crossing them, which plaintiff denied, the court properly submitted such question to the jury by an instruction that it was not incumbent on plaintiff to discover or anticipate and guard against any dangerous condition in the roadbed, tracks, or bridges which the exercise of ordinary care on defendant's part would have prevented, unless such condition was known to plaintiff prior to his injury, or was so open and obvious that it ought to have been known to any one in his situation at the time, had he used his senses; the burden being on defendant to prove that plaintiff did in fact have such knowledge, or that the condition of the bridge and the danger were so open and obvious that it ought to have been known to plaintiff had he used his senses.

Master and Servant—Injuries to Servant—Assumed Risk.†—Where plaintiff, an engineer on a logging road, when injured was operating an engine pushing a train of cars, and the track foreman was on the front car under orders from the superintendent to keep a lookout and determine whether the roadbed was in safe condition, plaintiff was entitled to rely on the foreman's faithful performance of his duties, and did not assume the risk of the foreman's failure to examine a defectively constructed bridge which had become in disrepair, by the collapse of which plaintiff was injured.

Master and Servant—Injuries to Servant—Fellow Servants—Non-assignable Duty.§—Where defendant's track foreman at the time plaintiff was injured was riding on the front car of the train being pushed over the road, in order to examine the condition of the roadbed, and ascertain whether it was safe, he was performing a nonassignable duty of the master, and was not a fellow servant of the engineer of the locomotive pushing the train.

Pleading—Amendment to Conform to Proof.—Code Va. 1904, § 3384, provides that, where a variance between the issues and proof appears, the court to promote substantial justice, if the opposite party cannot be prejudiced thereby, may allow the pleadings to be amended

†For the authorities in this series on the subject of the right of a railroad employee to assume that his master, or the latter's representative has, or will, perform its duties to him, see first foot-note of *McConnell v. Pennsylvania R. Co.* (Pa.), 34 R. R. R. 84, 57 Am. & Eng. R. Cas., N. S., 84; *Vaillancourt v. Grand Trunk Ry. Co.* (Vt.), 33 R. R. R. 353, 56 Am. & Eng. R. Cas., N. S., 353.

§For the authorities in this series on the question whether a foreman is a fellow servant of a hand working under his orders, see foot-note of *Texas & P. Ry. Co. v. Bourman* (U. S.), 31 R. R. R. 319, 54 Am. & Eng. R. Cas., N. S., 319; foot-note of *Tills v. Great Northern Ry. Co.* (Wash.), 31 R. R. R. 291, 54 Am. & Eng. R. Cas., N. S., 291; *Indianapolis, etc., Co. v. Kinney* (Ind.), 31 R. R. R. 264, 54 Am. & Eng. R. Cas., N. S., 264.

For the authorities in this series on the question what are, and are not, duties which a railroad can delegate, so as to escape liability as an employer under the fellow servant rule, see first foot-note of *Chamberlain v. Southern Ry. Co.* (Ala.), 34 R. R. R. 655, 57 Am. & Eng. R. Cas., N. S., 655.

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on such terms as to payment of costs, or postponement of the trial, or both, as may be deemed reasonable, or the court may direct the jury to find the facts, and after such finding, if it consider the variance could not have prejudiced the opposite party, shall give judgment according to the right of the case. Held, that where plaintiff sought to recover for injuries while operating a locomotive because of the collapse of a bridge, and alleged that defendant was negligent in the construction of the bridge, but the evidence showed that defendant's failure to inspect the bridge after a rain was the cause of the accident, the court at the conclusion of the evidence could properly permit plaintiff to amend his declaration so as to allege that the stringer of the bridge which broke was insufficient unless properly supported, and that by reason of defendant's failure to make reasonable inspections it was not properly supported at the time of the accident, and caused the injury; there being no demand by defendant for the imposition of terms or for a continuance by reason of such amendment.

In Error to the Circuit Court of the United States for the Western District of Virginia, at Lynchburg.

Action by Charles Gross against the Long Pole Lumber Company. Judgment for plaintiff, and defendant brings error. Affirmed.

The plaintiff below—now designated as defendant in error—was employed by the defendant below as locomotive engineer, and was engaged in running defendant's locomotives from the mills to its timber standing in the woods. Defendant operated a lumber plant and a railroad or tramroad from its plant to the woods where it owned standing timber, and, when the timber was cut, the logs were loaded on cars and hauled over this road by the locomotive to the mills. Plaintiff was hired as engineer for about two years prior to the accident complained of in this action. The railroad in question was five or six miles long, and ran up Lewis' creek, in Russell county, Va., and there were many bridges and trestles in the road over which the locomotive and cars had to run. The country was hilly and mountainous and the creeks were often considerably swollen and the bridges and track were liable to be washed out as a result of the rains. Some few weeks before the accident there had been washouts of some of the bridges, and it was necessary to replace them.

Noah Brown, foreman of defendant's hands, was requested to replace the bridge in question. The bridges were built by building two wooden abutments (like a square pen), and then laying two wooden "stringers" parallel to each other and _____ feet apart from one abutment to the other, then laying cross-ties across the "stringers" (the cross-ties extending over the side of each "stringer" about a foot), and then laying wooden rails

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across the ties, parallel with and over the "stringer." In the construction of the bridge in question Brown had charge of the work. It appears from the evidence that he put in an old, knotty piece of timber which was taken up out of an old track, and had a "saddle-notch" cut in it about three or four inches deep, as one of the stringers. He was told at the time by witness Hugh Gillespie that the stringer was "no account," and it also appears from the evidence that this stringer would not have supported an unloaded train or empty locomotive. After the bridge was built this "stringer" was propped up to keep it from breaking, and plaintiff ran his locomotive and train over it daily.

On Saturday and Sunday before the accident (which happened on Monday) there was a rain, the first after the bridge was built; but it appears that the rain was not heavy, and that the creek was only "a little bit" flush. On Monday morning after this rain plaintiff started out with his train, pushing five cars ahead with train foreman (who was also track foreman) Estep in charge. The cars were 22 feet long, the locomotive 15 feet, making the train 125 feet long, with the locomotive and engineer (plaintiff) in rear. Foreman Estep rode on front end of front car, for the purpose of watching the track and bridges, to see if the water had washed out any props, etc. They ran over all the bridges safely until they got to the one in question, and just as they reached this one Estep concluded that because they had gotten over the others safely he "hardly thought it worth while" to look out for this one; and it appears from the evidence that he had not made any inspection of this bridge in question from about the date the props were put under it up to the date of the accident. About the time the front car reached the bridge, Estep quit his post and went back to the engine to sand the track. The cars went over safely, but when the engine got on the bridge the engineer (plaintiff) heard something begin to "pop," and the next thing he knew his engine went over and inflicted the injuries complained of. The dangerous "stringer" had broken in two in the "saddle-notch" under the weight of the locomotive. The props were washed out and were afterwards seen lying in the creek nearby.

The jury returned a verdict in favor of the plaintiff in the sum of \$3,500, together with interest on the same from September 22, 1909, from which judgment defendant sued out a writ of error.

P. H. C. Cabell and *V. L. Sexton* (*Sexton & Roberts*, on the brief), for plaintiff in error.

Wm. H. Werth (*Routh & Routh*, on the brief), for defendant in error.

Before PRITCHARD, Circuit Judge, and BOYD and DAYTON, District Judges.

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PRITCHARD, Circuit Judge (after stating the facts as above). There are a number of assignments of error. The first relates to the refusal of the court to grant the motion of the defendant below to instruct the jury to return a verdict in its favor. This motion was based upon the following grounds: (a) That no negligence on the part of the defendant as the proximate cause of the jury was shown; (b) the negligence, if any, was that of a fellow servant; (c) the plaintiff assumed the risk. The learned judge who tried the case below in overruling the motion made the following statement:

"The rule of the federal court, as I understand it, as to fellow servants, is that with regard to such employees as we are considering in this case it depends on what the negligent servant was doing; that is to say, that the servant from whose negligence the plaintiff suffers was engaged in performing a nonassignable duty of the master. He is not a fellow servant of the plaintiff. It seems to me that the plaintiff here suffered injury from the negligence of Mr. Estep, who was charged with the duty of making an inspection to discover the result of this recent rise in the stream. Consequently, in the performance of that duty, he was performing a nonassignable duty. He was a vice principal, and not a fellow servant of the plaintiff. It seems to me that there is evidence of negligence; that is to say, evidence tending to show negligence on the part of the defendant in not having proper inspection of the bridge made after knowing there had been a rise in the stream since Saturday.

"The Court: The motion for a peremptory instruction is overruled.

"Mr. Cabell: Save the point."

It appears from the foregoing that the court was of opinion that the defendant's liability grew out of the failure to inspect the bridge after the rain. However, an inspection of the record discloses the fact that the original declaration contains an allegation to the effect that the defendant in the construction of its bridge or trestle at the point where the injury was incurred failed to use ordinary care, caution, and diligence in the selection of its stringers for the purpose of connecting one abutment with the other, and that the company placed across said trestle one stringer far too small and weak for the purposes of such construction, and that it was further weakened by rot and decay, and because of such defects was too weak, by far, to support an engine and loaded cars, such as were used over this line. These allegations could have been made more explicit, but we think they are sufficiently clear to inform the defendant of the character and nature of the negligence alleged to enable it to make proper defense to the same. There was evidence offered tending to show a failure on the part of the defendant to

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properly construct the trestle, that the stringer was weak and defective, and that the supports in the shape in which they were put in were liable to be washed away. There was, we think, sufficient legal evidence to go to the jury on the question as to whether the defendant exercised due care and caution in the construction of the bridge. It appears from the evidence of Superintendent Settle that he was as matter of fact informed as to the dangerous condition of the road after the rain, and gave Foreman Estep express instructions to inspect on account of such condition. Among other things, in his testimony bearing on this point, Settle said:

"* * * Q. What orders did you give to Mr. Estep, and when did you give them to him, and where? A. These—

"Mr. Worth: Wait. Are you going to show that those orders came to the plaintiff? I object. (Overruled. Point saved.)

"Q. Read the question. (It is read.) A. Saturday night and Sunday was when this rain was, I think it rained, up until about 1 o'clock on Sunday, and I was out looking at the flood, or looking at the situation to see how bad the flood was, near the place where I boarded at Mr. Osborne's. This house was very close to Lewis creek, the main creek below the mill, and I says to Mr. Estep, I says, 'I wonder how serious this flood is.' I says: 'It may not be as bad up on the logging road as it is here, as this place where we were was below the forks.'

"Q. Below what? A. The forks in the creek, where they came in, known as lower branch of the creek, where I was. We had water from both streams. I told him what to do, you understand, Monday morning, and I says to Mr. Estep: 'Now, I want you to be careful, as this flood, I don't know how bad it is, to be careful, and examine these trestles carefully, before you go over them, and I will go with the dry lumber train in the morning to examine these trestles.'

"Q. What position did Mr. Estep hold? A. Mr. Estep was train foreman.

"Q. Train foreman? A. Yes, sir."

Thus it appears that the superintendent had full knowledge of the rain, and that he gave Estep (the foreman) instructions to make proper inspections on account of the same. That it was the duty of the defendant company to maintain a safe place to work—roadbed, etc.—we think is the well-settled law of the land; and this applies to every railway, of whatever description.

Section 4274, 4 Thompson on Negligence, among other things provides:

"The obligation of maintaining a safe track for the protection of the servants employed in the operation of the railway is ascribed to every proprietor operating a railway of whatever description, and it is quite immaterial that the person or corporation operating the railway is not the owner of it."

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Also, Labatt on Master & Servant, §§ 67, 68b, contains the following statement as to the law bearing upon this subject:

“Railway Tracks; Generally.—The general rule is that any person who maintains a railway as a part of his plant is bound to exercise ordinary care to the end that it shall be so constructed and maintained as to be reasonably safe as a place to work. For the purpose of this rule it is immaterial whether the employer is as is usually the case a company engaged in transportation as a common carrier, or a company or individual operating a railway as an accessory to some other business—as a coal company, or a lumber manufacturer who owns and conducts a railroad running from his mill to the timber.

“Bridges.—Negligence is predicable of the construction of the bridges which are of insufficient strength to withstand the floods in the water course which they span, or are not strong enough to support the rolling stock.”

It is insisted that there is a variance between the evidence and the allegations contained in the declaration as to the construction of the bridge. No exception was taken to the evidence relating to this question, and it was permitted to go to the jury unchallenged. The failure of the defendant to object to this evidence at the time of its introduction was equivalent to a waiver, and it was too late, after a verdict had been rendered, to interpose an objection to the same. There may be an exception to this rule in some jurisdictions, but such is the rule in the state of Virginia.

In the case of *Bertha Zinc Co. v. Martin's Ex'rs*, 93 Va. 791, 22 S. E. 869, 70 L. R. A. 999, the first syllabus reads as follows:

“An objection that there is a variance between the evidence and the allegations should be made at the trial, so that the opposite party may be given the opportunity to amend, under Code 1887, § 3384 (Code 1904, p. 1792).”

Also, in the case of *Portsmouth St. R. Co. v. Peed's Administrator*, 102 Va. 662, 47 S. E. 850 it was held that, where there is a variance between the evidence and the allegations, the correct practice is to object to the evidence when offered, or move to exclude it; the attention of the court being thereby called to the variance, and an opportunity afforded to meet the emergency under the statute.

It is further contended by defendant that the plaintiff assumed the risks ordinarily incident to his employment, which, among other things, included any defects there may have been in the construction of the bridge or in keeping the same in proper repair. It cannot be reasonably contended that an engineer is required to stop his engine every time he approaches a trestle or bridge for the purpose of inspecting the same. While, by virtue of his contract, the engineer, like other employees, assumes those risks that are open and obvious—and this

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is also true as to any defects of machinery that are patent—yet it is not true as to defects that are latent and therefore unobservable. The defendant sought to show by the testimony of witness Newenham that the plaintiff had been instructed by the superintendent of the company to examine all trestles along the road before crossing them. The deposition of Newenham was offered in evidence, and among other things the witness made the following statement:

“* * * Gross told me in a conversation I had with him when I went down to investigate it that he was instructed by the superintendent of the company, Mr. Henry Settle to examine all trestles along the road before crossing them; that he examined all but this one, which was the last one, so he did not examine it; and that the accident was his own fault.”

This evidence is rather vague and indefinite, inasmuch as the witness does not undertake to fix the time when the instructions were given to the plaintiff. The construction sought to be placed upon this testimony was that it tended to establish the fact that the plaintiff had been so instructed after the rain had washed away the props in question; that in the light of this evidence the plaintiff assumed the risk incident to passing over the bridge at the time the accident occurred.

After having testified, the plaintiff below was recalled and testified as follows:

“Q. Mr. Gross, please state if you ever had a conversation with Mr. Newenham, and if you told him that you were instructed by the superintendent of the company, Mr. Henry Settle, to examine all the trestles along the road before crossing them, and that you examined all but this one, so you did examine it and that the accident was your own fault? A. No, sir.”

The testimony of Newenham was flatly contradicted by the plaintiff, and the court very properly submitted an instruction by which the jury was left to determine whether the plaintiff made such statement and whether he received such instructions from the superintendent. The instruction of the court on this point is in the following language:

“The court instructs the jury that as to all and each one of the duties set forth in instruction No. 1 the plaintiff had the right, in the absence of knowledge or belief to the contrary, to presume and to rely upon the presumption that they had been performed by defendant or its representative with ordinary care; and it was not incumbent upon plaintiff to discover or anticipate and guard against any dangerous condition in said road-bed, tracks, or bridges, which the exercise of ordinary care on the part of defendant would have prevented, unless such condition was either known to plaintiff prior to his alleged injury, or was so open and obvious that it ought to have been known to

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any one in his situation at the time, had he used his senses. And the court tells the jury that the burden is upon the defendant to prove to the satisfaction of the jury from all the evidence in the case that the plaintiff did in fact have such knowledge, or that the condition of the bridge in question and the danger arising therefrom (if any) was so open and obvious that it ought to have been known to plaintiff had he used his senses."

If, in approaching the bridge, the engineer saw, or could have seen, or had knowledge of the defective condition of the bridge, then, under such circumstances, the doctrine of assumed risk would apply. Under the foregoing instruction, the question as to whether the plaintiff had knowledge of the dangerous condition of the bridge was submitted to the jury, and the jury, by its verdict, determined that question in favor of the plaintiff. We think this instruction fully covered the law bearing upon this phase of the question, and that the court did not err in refusing to submit the instruction tendered by the defendant upon this point. In this instance Estep, the foreman, rode on the front car for the purpose of keeping a lookout and determining as to whether the roadbed was in a safe condition. This fact was well-known to the engineer, and in the performance of his duty he had a right to rely upon Estep for the faithful performance of his duties in this respect. Under these circumstances, we are of opinion that the doctrine of the assumption of risk does not apply.

It is also insisted that the injury sustained by the plaintiff was due to the negligence of a fellow servant. The court below in overruling a motion to instruct the jury to return a verdict in favor of the defendant clearly and concisely stated the law as respects this point, and, in view of the court's statement, we do not deem it necessary to further discuss this question. That there was evidence as to the failure of the defendant to properly contract its bridge or trestle at this point sufficient to go to the jury is clearly shown by an inspection of the record, and we think the court very properly overruled the motion.

At the conclusion of the evidence, the plaintiff asked leave to amend his declaration so as to allege that the stringer which broke was insufficient, unless properly supported; that, while it was properly supported for a time, by reason of the defendant's negligent failure to make reasonable inspections, it was not properly supported at the time of the accident which caused the injury to the plaintiff. The court permitted this amendment to be made, and the defendant excepted to the same. It is therefore insisted that at that stage of the proceedings, after all the evidence had been offered and the case submitted to the jury, the court was without power to permit such amendment. This action presents two questions for our consideration: (a) As to whether the court, at this juncture, had the power to permit

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such amendment to be made; (b) whether under the law of Virginia the amendment in question was a proper one.

Section 3384, Code Va. 1904, reads as follows:

“Sec. 3384. Remedy, when at trial variance appears between evidence and allegations or recitals.—If, at the trial of an action, there appears to be a variance between the evidence and allegations or recitals, the court, if it consider that substantial justice will be promoted and that the opposite party cannot be prejudiced thereby, may allow the pleadings to be amended, on such terms as to the payment of costs of postponement of the trial, or both, as it may deem reasonable. Or, instead of the pleadings being amended, the court may direct the jury to find the facts, and, after such finding, if it consider the variance such as could not have prejudiced the opposite party, shall give judgment according to the right of the case.”

In view of the evidence, the amendment in question was in harmony with the theory upon which the case had been proceeded with up to the time it was allowed, and we think that by the allowance of the same substantial justice was obtained, which leaves open the question as to whether the defendant was prejudiced thereby. The defendant under the well-settled rule of procedure was entitled to have the order made upon terms, and, if it had so desired, it could, upon proper motion, have secured a continuance of the case, and we feel sure that the court below would have ordered a mistrial and required the plaintiff to pay the costs of the term, if a motion to that effect had been made. But no such motion was made, the defendant simply contenting itself with excepting to the action of the court, there being no intimation that it was taken by surprise or that it had any other or additional evidence to offer in opposition to the contention of the plaintiff as then presented by the amended declaration.

In the case of *Langhorne v. Richmond City Ry. Co.*, 91 Va. 364, 22 S. E. 357, the court, in referring to the provisions of section 3384, said:

“Statutes allowing amendments are favored, and, although resting in the sound discretion of the court, the authorities, without exception, it is said, declare that such statutes are remedial, and must be construed literally. Enc. Pl. & Pr. 516, 517. Section 3384 of the Code was clearly intended to provide for such cases as the one under consideration. By allowing the pleadings to be amended so as to put in issue the identity of the Richmond Railway Company and the defendant company, the whole controversy between the parties could have been settled. By refusing it, the court compelled the plaintiff to take a nonsuit, or to submit to a verdict in favor of the defendant, not upon the merits of the case, but because, as it appeared from the evidence then before the jury, one corporation had done the injury com-

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plained of, and another corporation had been sued; and that, too, when the plaintiff was insisting that this was not the fact, but that they were one corporation known by both names, and asking the court for leave to amend his declaration, that he might have an opportunity to introduce evidence to show it. There is no suggestion of laches on the part of the plaintiff in not amending, or asking leave to amend, his pleadings earlier. Neither does it appear that the defendant would have been prejudiced thereby, except in being prevented from taking advantage of the variance between the pleading and proof in the cause, which advantage it was one of the express objects of section 3384 of the Code to prevent."

In the case of *Alexandria & F. R. Co. v. Herndon*, 87 Va. 193, 12 S. E. 289, the court said:

"(1) The first assignment is that the court below erred in refusing to remand the case to rules, and in allowing the plaintiff to amend at bar, after sustaining the defendant's demurrer to the plaintiff's declaration. We fail to perceive any cause of reversal in the action of the court in this respect. Had the amendment been of such a nature as to render necessary some change in the defense, and a trial had been forced upon the defendant at the same term at which the amendment was allowed, then there would have been ground of complaint. But the amendment consisted merely in striking out of the declaration certain superfluous and immaterial words, and, moreover, the trial was delayed until the succeeding term. It is not only common, but commendable, practice for trial courts to allow amendments in the pleadings at bar without putting the party to the unnecessary trouble and expense of going back to rules, provided the other party is not put to the disadvantage of being forced into trial on new and difficult issues."

The rule is very clearly stated in 1 Enc. Pl. & Pr., p. 564, note 5:

"(7) Summary statement of the rule.—As long as the plaintiff adheres to the contract or the injury originally declared upon, an alteration of the modes in which the defendant has broken the contract or caused the injury is not an introduction of a new cause of action. The test is whether the proposed amendment is a different matter, another subject of controversy, or the same matter more fully or differently laid to meet the possible scope and varying phases of the testimony."

In the case of *New River Min. Co. v. Painter*, 100 Va. 507, 42 S. E. 300, the court among other things said:

"Counsel have not cited, nor have we in our investigation found, any decision of this court which indicates what amendments of the declaration the court may allow after appearance; but there are many decisions upon the question in other jurisdictions. The rule generally prevailing seems to be that such

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amendments will be permitted as have for their object the trial and determination of the subject-matter of the controversy upon which the action was originally based, but amendments will not be allowed which bring into the case a new and substantive cause of action, different from that declared on, and different from that which the plaintiff intended to assert when he instituted his action. If the plaintiff in the amended declaration is attempting to assert rights and to enforce claims arising out of the same transaction, act, agreement, or obligation, however great may be the difference in the form of liability as contained in the amended from that stated in the original declaration, it will not be regarded as for a new cause of action. In such cases the original and amended declarations, and the count or counts in each, are regarded as variations in the form of liability to meet the possible scope and varying phases of the testimony, which is one of the very objects and purposes of adding several counts and of making amendments to a declaration. *Snyder v. Harper*, 24 W. Va. 206, 211; *Smith v. Palmer*, 6 Cush. [Mass.] 513, 519; *Yost v. Eby*, 23 Pa. 327, 331."

Here there was no intimation on the part of counsel for the defendant that the defendant was surprised or that it was prepared to proceed with the trial with the pleadings as amended. and, as we have said, there was no request for a continuance of the case after this amendment was permitted. Under these circumstances, we are of opinion that the action of the lower court does not involve an abuse of judicial discretion.

There are various other assignments of error, all of which we have carefully considered, but we do not deem it necessary to enter into a discussion of them, inasmuch as the disposition of the points that we have discussed clearly determines the matter at issue in this controversy. Some of these assignments relate to the refusal of the court below to charge certain propositions of law as requested by the defendant, and some of them relate to the charge as given by the court. We think that the judge very properly refused to give the instructions submitted by the defendant, and it should be remembered that in many instances these instructions were substantially given by the court in its charge and the others were not justified in view of the pleadings and evidence; and the charge of the court, taken as a whole, clearly states the law bearing upon the questions involved herein.

We are therefore of the opinion that the rulings of the lower court upon the various questions presented are correct; and, failing to find that the court below committed any error prejudicial to the rights of the defendant, the judgment of that court is affirmed.

NEW YORK, N. H. & H. R. Co. *v.* DAILEY.

(Circuit Court of Appeals, Second Circuit, May 2, 1910.)

[170 Fed. Rep. 289.]

Master and Servant—Master's Liability for Injury to Servant—Dangerous Structures.*—If a master provide structures which guard against all accidents which can reasonably be foreseen, he has done his duty in that respect to his employees.

Master and Servant—Master's Liability for Injury to Servant—Place to Work.†—Plaintiff was employed as an engine hostler at defendant's roundhouse. A dead engine, with no air to operate the brakes, came in and was turned over to him, and a co-employee with another engine kicked it into the roundhouse from the turntable. It was given such speed that plaintiff was afraid it would go through the building, and started to jump off to block the wheels, when he struck the post between the stalls and was injured. There was a clearance between the engine and post of about 11 inches, which was greater than the average in roundhouses. The evidence showed that so far as known no similar accident had ever occurred; it being the duty of the hostler under ordinary circumstances to remain on the engine. Held, that defendant was not chargeable with negligence because the space was not greater, which rendered it liable for the injury, the construction being the usual one and safe for employees under any circumstances to be reasonably anticipated; nor was it liable for the negligent act of the man operating the other engine, which primarily brought about the situation, who was a fellow servant.

In Error to the Circuit Court of the United States for the Southern District of New York.

Action by Oliver Dailey against the New York, New Haven & Hartford Railroad Company. Judgment for plaintiff (167 Fed. 592), and defendant brings error. Reversed.

*For the authorities in this series on the subject of the degree of care required of a railroad, as an employer, in furnishing a safe place to work, see foot-note of *Texas & P. Ry. Co. v. Tuck* (Tex.), 35 R. R. R. 748, 58 Am. & Eng. R. Cas., N. S., 748; last foot-note of *McConnell v. Pennsylvania R. Co.* (Pa.), 34 R. R. R. 84, 57 Am. & Eng. R. Cas., N. S., 84; *Vaillancourt v. Grand Trunk Ry. Co.* (Vt.), 33 R. R. R. 353, 56 Am. & Eng. R. Cas., N. S., 353.

†For the authorities in this series in the subject of the duties and liabilities of railroad companies, as employers, with respect to objects, or structures over or near railroad tracks, see first foot-note of *St. Louis, etc., Co. v. Phillips* (Ala.), 35 R. R. R. 792, 58 Am. & Eng. R. Cas., N. S., 792; fourth paragraph of first-note of *Thomas v. Wisconsin Cent. Ry. Co.* (Minn.), 33 R. R. R. 609, 56 Am. & Eng. R. Cas., N. S., 609.

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Chas. M. Sheafe, Jr. (Frederick J. Moses and Nathaniel S. Cowin, of counsel), for plaintiff in error.

Charles Morschauer (W. E. Hoysradt and Abram J. Rose, of counsel), for defendant in error.

Before COXE, WARD, and NOYES, Circuit Judges.

COXE, Circuit Judge. The plaintiff was in the employ of the defendant as "hostler" at East Hartford, Conn. After an engine had come in from a run it was his duty to see that it was supplied with water, coal and sand and placed in a stall at the roundhouse until needed for the next run. The roundhouse was of the usual construction, built in a semicircle around a circular turntable, which, after the engine was placed upon it, was turned until the track on the turntable registered with the track leading to the stall in the roundhouse where the engine was to be placed. The stalls were separated by posts which supported the roof and also supported swinging doors. The clearance between the engine and these posts was about 11 inches. The construction in this respect was similar to that of other roundhouses, the clearance varying in different structures from about 4 inches, which is the minimum clearance, to 13 inches, which is the maximum. The plaintiff was an experienced railroad man and for five years prior to the accident had acted as "hostler" in defendant's roundhouse at Hopewell. This roundhouse was similar in construction to the one at East Hartford where the accident happened. The evidence showed that the clearance was insufficient to enable a man to alight from an engine while it was passing through the entrance to the stall before the posts had been passed. Ordinarily the "hostler" has no occasion to alight at this point. His duty is to remain on the engine until it comes to a standstill. It also appeared that such an accident as happened to the plaintiff was unknown among railroad men. The combination of unusual circumstances which led to the accident in question was as follows: The engine came in from the road at about 5 a. m. It had not sufficient steam to move into the roundhouse and there was no air to operate the brakes: in short, the engine was "dead." This condition was reported to one Moriarity, who procured another locomotive and pushed the plaintiff's engine to the sand house, the water station, and, finally, onto the turntable. Subsequently, with still another locomotive, Moriarity backed up against the plaintiff's engine on the turntable and gave it a "kick" for the purpose of sending it into the stall. The plaintiff, fearing lest the engine might run into and, perhaps, through the rear wall of the roundhouse, and being unable to stop its momentum, attempted to alight at the moment the post was being passed, for the purpose of

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blocking the wheels. He was caught between the post and the tender and received the injuries complained of.

At the close of the testimony the defendant moved the court to dismiss the complaint and direct a verdict for the defendant on the following grounds: First, that no negligence had been proven against the defendant in the construction and maintenance of the roundhouse; second, that if the proximate cause of the accident was the action of Moriarity, it was the act of a fellow servant, for which the defendant is not responsible; third, that the plaintiff had full knowledge of the situation on the night of the accident and assumed the risk of the alleged defects in construction. This motion was denied and the defendant excepted.

It is clear that the accident was caused, primarily, by Moriarity, who was a fellow servant, in giving the "dead" engine upon which the plaintiff was stationed too vigorous a "kick" when it was helpless upon the turntable. Whether the plaintiff's action contributed to the accident it is unnecessary to decide. In order to sustain the verdict it must appear that the defendant was guilty of fault. If not guilty of fault, there can be no verdict against it. The only negligence alleged is in the construction of the roundhouse in question, which is said to be faulty for the reason that there was not a wider space between the engines and the posts at the entrance to the stalls. It is shown that the construction in this regard was the usual one and that the spaces left were much wider than in the average roundhouse. Was the defendant bound to guard against the wholly abnormal and unusual combination of circumstances which caused the plaintiff's injuries? Is a master required to anticipate an accident which, so far as the evidence here is concerned, had never happened before and may never happen again? We think not. The authorities cited by the plaintiff are not, in our judgment, germane. They all relate to cases where the dangerous structures were allowed to remain where employees in the discharge of their duties might come in contact with them. For instance, it has frequently been held that a brakeman who is required to be on the roof of a car while passing a low bridge may recover, if no warning is given of the proximity of the dangerous structure. So, too, where telegraph poles or other structures are placed so near the moving trains that an employee in the discharge of his duty may come in contact with them. In fact, this court, in the case of the Boston & Maine Railway Company v. John N. Gokey, 149 Fed. 42, 79 C. C. A. 64, held that an employee who was required, while in the discharge of his duty, to be upon a moving train while passing a switch target which was placed so near the track as to strike him while on the ladder at the side of the car, might maintain an action against the railroad.

These cases rest upon the proposition that if it can be foreseen

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by the exercise of ordinary prudence that an employee may be injured by the machinery furnished for his use, it is the duty of the employer to minimize the danger as far as possible.

In the case at bar, under ordinary circumstances, the "hostler" is required to remain at his post on the engine until it is finally placed in the stall in the roundhouse. Ordinarily the engines are operated by their own steam and are stopped by their own brakes. Here the concurrence of the absence of steam and of insufficient air to operate the brakes made it necessary to call in the services of another engine. The defendant was not, however, required to guard against such an extraordinary combination of circumstances as produced the injury in question. The opening into the stalls of the roundhouse between the posts was ample for all ordinary conditions and having provided such a structure, the defendant cannot be held responsible because the plaintiff saw fit to attempt to alight at the very moment when the engine was passing the posts. If the contention of the plaintiff be sustained by the courts, it necessarily follows that the owner of a stable who has provided ample room for his horses and carriages to enter can be held liable if his coachman loses control of the horses and receives injuries in an attempt to descend from the vehicle at the moment it is passing through the door. It will hardly be contended that the owner of a garage is required to provide an entrance wide enough not only to admit the motor car with perfect safety, but also sufficiently ample to enable the chauffeur, should the machine become unmanageable, to leap out while passing through the entrance.

We know of no rule holding a master to such extreme care. If he provides structures which guard against all accidents which can reasonably be foreseen, he has done his duty to those whom he employs. We think the court should have granted the motion for the direction of a verdict for the defendant.

Judgment reversed.

FELDMAN *v.* DETROIT UNITED RY.

(Supreme Court of Michigan, Sept. 27, 1910.)

[127 N. W. Rep. 687.]

Negligence—Imputed Negligence—Action by Child—Negligence of Parent.*—In an action by a child for injuries, the negligence of the parent cannot be imputed to the child.

Parent and Child—Loss of Services of Child—Contributory Negligence of Parent.†—The contributory negligence of a parent will bar an action by him for the loss of services of his child resulting from personal injuries.

Negligence—Imputed Negligence—Contributory Negligence of Parent.—In an action, under Comp. Laws, §§ 10,427, 10,428, for death of a child, if the parent is the real beneficiary, his contributory negligence will be imputed to the child, although the action is brought by the personal representative.

Evidence—Opinion—Value of Services.—In an action for death of a child, the testimony of a witness who possessed no knowledge on which to base an opinion that "it looks like that, if the boy turned out anything like a success, he could get \$4,000 or \$5,000 or more," prior to his arrival at the age of 21 years, was improperly admitted.

Evidence—Res Gestæ.‡—Twenty minutes after a street car had run over and killed a child the motorman exclaimed to an angry crowd which had gathered about the car, and assaulted the conductor, "Gentlemen, it is my fault." Held, that the statement cannot be admitted as part of the *res gestæ* in an action for the child's death, since it was not voluntary and spontaneous.

Error to Circuit Court, Wayne County; Morse Rohnert, Judge.

Action by Max J. Feldman, administrator, against the Detroit United Railway. Judgment for plaintiff, and defendant brings error. Reversed, and a new trial ordered.

Argued before BIRD, C. J., and OSTRANDER, HOOKER, MOORE, MCALVAY, BROOKE, BLAIR, and STONE, JJ.

*See fourth foot-note of *United Rys. & Elec. Co. v. Carneal* (Md.), 34 R. R. R. 705, 57 Am. & Eng. R. Cas., N. S., 705; first foot-note of *Perryman v. Chicago City Ry. Co.* (Ill.), 34 R. R. R. 93, 57 Am. & Eng. R. Cas., N. S., 93.

†For the authorities in this series on the subject of the effect of the contributory negligence of parents on the right to recover for the injuries or death of their children, see last foot-note of *Lundergan v. New York Cent. & H. R. R.* (Mass.), 34 R. R. R. 344, 57 Am. & Eng. R. Cas., N. S., 344.

‡For the authorities in this series on the question when the declarations of railroad employees are, and are not, *res gestæ* in actions against their respective companies, see *Vaillancourt v. Grand Trunk Ry. Co.* (Vt.), 33 R. R. R. 353, 56 Am. & Eng. R. Cas., N. S., 353.

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George B. Greening and Friedman & Smilansky, for appellant.
Corliss, Lecte & Joslyn (T. T. Leete, Jr., of counsel), for appellee.

MCALVAY, J. Plaintiff, as administrator of the estate of his son, Marvin Feldman, a child of the age of four years, brought suit against defendant for damages occasioned by the death of this child, claimed to have been caused by the negligence of the servants and agents of defendant. Plaintiff and his family lived on Winder street, in the city of Detroit, between Hastings and Rivard streets, at about the middle of the block. On Sunday afternoon May 21, 1905, he, with his wife, were at home as he testified, "enjoying a Sunday afternoon rest." Some one of his relatives had given the boy some money. He went out of the house with his sister, who was seven years old. Plaintiff did not know where he was going. He was next seen on Hastings street going north on the east side of the street with a little girl. There is some doubt whether this girl was the sister. One witness testifies that it was his daughter, of the age of six year. When the boy had gone a short distance north on Hastings street, upon which there is a street car line of defendant company, he turned out into the street alone, running across it, supposedly towards some candy shops located almost opposite. He was struck by an approaching car, and killed. It is admitted that this car had stopped at Napoleon street next south of Winder street. There is a dispute as to whether it stopped at Winder street, and there is also a dispute as to whether the car was running fast or slow at the time of the accident. The record shows that the boy was 20 feet or more north of the corner of Winder street when he started to run across the track. The distance from this corner north to the alley is 97 feet. The outside length of the car is 35 feet. It was stopped about 2 feet south of the south line of the alley. It moved about 40 feet after striking the child. No question is raised as to the competency of the motorman, nor as to his acts in stopping the car. There is a dispute as to whether the gong was sounded by him. When the accident occurred, the conductor was in the car, taking fares. He saw nothing of the accident. When he came out of the car, a crowd had gathered and set upon him, and assaulted him violently. The case was submitted to the jury and a verdict returned in favor of plaintiff, upon which judgment was entered.

Defendant brings the case here for review upon a writ of error. Errors are assigned upon the charge of the court, and the refusal to charge as requested relative to the contributory negligence of plaintiff, and also upon certain rulings upon evidence. The most important question in the case is whether under the facts presented the court was in error in charging the jury that "there is no testimony tending to show any contributory negligence on the part of the father, so that the question of whether or not there is

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a liability depends simply and solely upon the question whether or not the motorman was negligent."

The first question to be considered is whether, if plaintiff was guilty of contributory negligence, such negligence may be imputed to his infant child in this case. Upon the reargument of the case counsel for plaintiff gave large attention to the question, and cited numerous authorities which he claimed supported his contention that such contributory negligence could not be imputed to the child in cases like this. This action was brought under sections 10,427, 10,428, Comp. Laws, known as "Lord Campbell's Act," and commonly called the "Death Act." The profession is familiar with its terms. In all such cases the action must be brought in the name of the personal representative of the deceased, "and the amount recovered in every such action shall be distributed as provided by law for the distribution of the personal estate of persons dying intestate," and "the jury may give such damages as they shall deem fair and just, with reference to the pecuniary injury resulting from such death, to those persons who may be entitled to such damages when recovered."

In the instant case under this statute the suit is brought by the father, as administrator of the personal estate of his minor child who died intestate, alleging that as such he is entitled to what he would have earned had he not been killed by the negligence of defendant, and by such death plaintiff was damaged in that he lost the value of the services of his intestate. There is want of harmony in the authorities upon the question of the negligence of a parent being imputed to the child of tender years in actions for personal injuries to the child. We find from an examination of the authorities that the question has been considered by the courts in three classes of cases: (1) In actions brought by the child in its own right. (2) In actions brought by the parent for loss of services. (3) In actions brought under Lord Campbell's act by the personal representative of the child to recover for loss of services to the parent. In the first class of cases by the great weight of authority it is held that the negligence of the parent cannot be imputed to the child. In the second class the negligence of the parent will bar the action. In the third class, where although the action is brought by the personal representative for the benefit of the child, if the parent is the real beneficiary, his contributory negligence will be imputed to the child. The most recent discussion upon this question, where cases are cited and digested, and reference is made to all the leading authorities, will be found in the first two of the following cases: *Davis, Adm'r, v. Seaboard Air Line Ry.*, 136 N. C. 115, 48 S. E. 591; 1 Am. & Eng. Ann. Cas. 214, and notes; *Atch., etc., Ry. Co. v. Calhoun*, 18 Okl. 75, 89 Pac. 207; 11 Am. & Eng. Ann. Cas. 681, and notes; also *Ploof v. Burlington Trac. Co.*, 70 Vt. 509, 41 Atl. 1017, 43 L. R. A. 108; *Tiffany, Death by Wrongful Act*, §§ 68-72. In this case the fact that this child was unattended upon the street

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at the time, he was killed by the car established prima facie the negligence of his parents. Whether their conduct should be excused or justified by circumstances was a question of fact for the jury, and the court should have so instructed. Grant, Adm'r, v. City of Fitchburg, 160 Mass. 16, 35 N. E. 84, 39 Am. St. Rep. 449. See, also, Lindsay, Adm'r, v. Railroad Co., 68 Vt. 556, at page 567, 35 Atl. 513; Davis, Adm'r, v. Seaboard Air Line Ry., supra; Green v. Chi. & West Mich. Ry. Co., 110 Mich. 648, 68 N. W. 988. The court was in error in charging the jury upon the question of contributory negligence as above quoted. As a new trial will be ordered, other questions must necessarily be passed upon for the benefit of the trial judge.

A witness named Jacobs was produced by plaintiff, and testified relative to the value of the services of plaintiff's intestate, to recover the loss of which this action was instituted. His examination shows that he had no knowledge upon which to base his opinion. He testified, over objection and exception: "It looks like that, if the boy turned out anything like a success, he could get \$4,000 or \$5,000 or more." This was his answer to a question as to what would be the earnings of this child over and above its costs and expenses up to the age of 21 years. Witness had already said he could tell what his experience had been, but could not tell of others. It was the random, loose statement of a garrulous witness, and should have been stricken out as defendant requested.

A witness over an objection was permitted to testify that the motorman 15 or 20 minutes after the car struck the child, but before the body had been removed from under it, made the statement, "Gentlemen, it is my fault." A motion to strike it out was denied. It is urged that this was a voluntary and spontaneous statement, made by the motorman while in the discharge of his duty, and so near the time of the accident as to be part of the *res gestæ*. The witness states that a great crowd of a thousand people had gathered about the car; that they became noisy; that they were talking with the motorman when he made this statement. The record also shows that this crowd was violent; that the conductor as soon as the accident occurred ran to assist in getting the child out from under the car, but was prevented and not permitted to do so by this crowd, and was set upon by them and seriously assaulted and injured; that they also assaulted the motorman, and that the conductor ran to a telephone for police protection. This witness says that the motorman stood on the platform of the car with tears in his eyes. All of the authorities in discussing the admissibility of declarations of this character hold that such statements must be voluntary and spontaneous. Under the circumstances of this case, this statement claimed to have been heard by this witness cannot be held by this court to have been either voluntary or spontaneous. It is not necessary to

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know what the questionings of this angry and excited crowd were. They had already assaulted him and severely injured the conductor. The overwhelming inference from these facts is that whatever he said was under duress and in dread of personal violence. To extend the mantle of *res gestæ* to include statements so made would be reprehensible. For the reasons given, the testimony should have been stricken out. No opinion is expressed as to whether under other circumstances the conductor's statement would have been admissible. It was error under these circumstances to admit it.

Other assignments of error are discussed, but an examination discloses that they are of minor importance, and in view of a new trial, and the probability that they will not arise again, we do not think they require attention.

The judgment for the errors pointed out is reversed, and a new trial ordered.

NEW YORK CENT. & H. R. R. CO. v. WILLIAMS, Labor Com'r.

(Court of Appeals of New York, June 14, 1910.)

[92 N. E. Rep. 404.]

Master and Servant—Payment of Wages—Regulation—Statutes.—Labor Law (Consol. Laws, c. 31) §§ 10, 11, 12, requiring railroad companies to pay their employees wages in cash at least semimonthly, construed in connection with Penal Law (Consol. Laws, c. 40) § 1272, as amended by Laws 1909, c. 205, making it a misdemeanor for a corporation not to pay the wages of all its employees in accordance with the provisions of the labor law, was intended to prohibit a railroad company from entering into contracts of employment containing provisions at variance with such act.

Statutes—Invalid Provisions—Separation.—An invalid separable provision of a statute does not affect the balance of the act, though the invalid part is in a section containing valid provisions.

Constitutional Law—Obligation of Contract—Charters—Amendment—Reserved Power.—In exercising the reserved power to amend corporate charters, the Legislature may not deprive a corporation of property already acquired, nor of the proceeds of lawful contracts previously made, nor destroy or substantially impair the purposes of the grant or rights which are vested in the corporation thereunder, but it may make any alteration or amendment of a charter which will not defeat or substantially impair the object of the grant, or any rights vested under it, and which the Legislature may deem necessary to secure either that object or any public right.

Constitutional Law—Liberty to Contract—Charters—Amendment.—Railroad companies being clothed to some extent with a public

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trust, and being under an obligation to discharge duties which affect the community at large, the Legislature may amend their charters in the furtherance of the public interest for the benefit of their employees, even though such amendments operate as limitations on the exercise of the right to contract.

Constitutional Law—Due Process of Law—Freedom of Contract—Railroads—Wages—Time and Medium of Payment.*—Labor Law (Consol. Laws, c. 31) §§ 10, 11, 12, requiring that railroads shall pay their employees wages due them semimonthly in cash, was a proper exercise of the Legislature's power to amend corporate charters in furtherance of the public interest, and was not unconstitutional as a deprivation of a railroad's property without due process of law, nor as impairing the railroad's right to contract.

Commerce — Interstate Commerce — State Statutes — Wages. — Though Labor Law (Consol. Laws, c. 31) §§ 10, 11, 12, requiring that railroads shall pay their employees wages semimonthly in cash, relate to the wages of railway servants employed entirely within the state, and also to the wages of those whose duties take them from New York into other states; Congress not having passed any legislation dealing with the same subject-matter, such act is not invalid as an unconstitutional interference with interstate commerce.

Appeal from Supreme Court, Appellate Division, Third Department.

Suit by the New York Central & Hudson River Railroad Company against John Williams, as Labor Commissioner of New York. From a decree at Special Term in favor of defendant (64 Misc. Rep. 15, 118 N. Y. Supp. 785), affirmed by the Appellate Division (136 App. Div. 904, 120 N. Y. Supp. 1137), plaintiff appeals. Affirmed.

The action is a suit in equity brought to restrain the commissioner of labor of the state of New York from instituting any action or proceeding against the plaintiff for the recovery of penalties for violations of those provisions of the labor law which require a corporation operating a steam surface railroad to pay to its employees their wages semimonthly and in cash. The provisions of the labor law involved in the controversy are as follows:

"Sec. 10. Cash Payment of Wages. Every manufacturing, mining, quarrying, mercantile, railroad, street railway, canal, steamboat, telegraph and telephone company, every express company, every corporation engaged in harvesting and storing ice, and every

*For the authorities in this series on the subject of the constitutionality of employers' liability acts, see second foot-note of *Kane v. Erie R. Co.* (C. C. A.), 20 R. R. R. 233, 43 Am. & Eng. R. Cas., N. S., 233, where all those preceding it are collected; foot-note of *Missouri Pac. Ry. Co. v. Castle* (C. C. A.), 35 R. R. R. 436, 58 Am. & Eng. R. Cas., N. S., 436.

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water company, not municipal, and every person, firm or corporation, engaged in or upon any public work for the state or municipal corporation thereof, either as a contractor or a subcontractor therewith, shall pay to each employee engaged in his, their or its business the wages earned by such employee in cash. No such company, person, firm or corporation shall hereafter pay such employees in scrip, commonly known as store money orders." Consol. Laws, c. 31, § 10.

"Sec. 11. When Wages are to be Paid. Every corporation or joint-stock association, or person carrying on the business thereof by lease or otherwise, shall pay weekly to each employee the wages earned by him to a day not more than six days prior to the date of such payment. But every person or corporation operating a steam surface railroad shall, on or before the first day of each month, pay the employees thereof the wages earned by them during the first half of the preceding month ending with the fifteenth day thereof, and on or before the fifteenth day of each month pay the employees thereof the wages earned by them during the last half of the preceding calendar month." Consol. Laws, c. 31, § 11.

Section 12 of the same statute provides that if a corporation shall fail to pay the wages of an employee as above provided it shall forfeit to the people of the state the sum of \$50 for each such failure, to be recovered by the factory inspector in his name of office in a civil action; but by section 30 of the labor law (Laws 1897, c. 415), as amended by chapter 505 of the Laws of 1907 and chapter 520 of the Laws of 1908, the duty of the factory inspector in this respect was transferred to the commissioner of labor.

The complaint alleged in substance that, in so far as the foregoing legislation purported to subject the plaintiff to actions for penalties for each and every failure on its part to pay the wages of its employees in cash and semimonthly, it was violative of the rights secured and guaranteed to the plaintiff by the Constitution of the United States and by the Constitution of the state of New York.

The substance of the defense as set up in the answer was that the provisions of the labor law thus assailed were constitutional; and this defense was sustained by the court at Special Term, which filed findings of fact and conclusions of law, upon which judgment was entered in favor of the defendant. That judgment has been affirmed at the Appellate Division by a divided court.

Alexander S. Lyman and *George N. Orcutt*, for appellant.

Eward R. O'Malley, Atty. Gen., for respondent.

WILLARD BARTLETT, J. The purpose of this litigation is to test the constitutionality of a recently enacted statute requiring rail-

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road corporations in this state to pay the wages of their employees semimonthly and in cash. In order to present the question to the courts for determination, the plaintiffs have brought suit in equity against the state commissioner of labor to restrain him from instituting actions to recover the penalties prescribed by the statute for noncompliance with its provisions. Judgment was rendered in favor of the defendant at Special Term, and affirmed, by a divided court, at the Appellate Division. The plaintiff has appealed to this court.

In the briefs of counsel and in the argument at the bar, it has been assumed that the provisions of the labor law, which are the subject of attack, operate not only to introduce the requirement of semimonthly payments into all contracts between the railroad company and its employees, in which there is no express stipulation as to the time when wages shall be payable, but also to prohibit such corporations from making any contracts with their employees which shall vary the time of payment from that prescribed in the statute. This view is sustained by the amendment to the penal law enacted in 1909 when section 1272 was made to provide that a corporation which does not pay the wages of all its employees in accordance with the provisions of the labor law is guilty of a misdemeanor. Laws 1909, c. 205. It is true that this amendment was not adopted until after the commencement of the present action, but it was in force when the judgment was rendered, and it serves to indicate the intent of the Legislature in enacting the labor law itself. Where railroad corporations are commanded to pay the wages of their employees at fixed periods, and are made liable to indictment and criminal punishment for failure so to do, the implication is tolerably clear that they may not enter into contracts containing provisions at variance with the legislative command. Accordingly I think we must treat the requirement of the labor law that the employees of a steam surface railroad corporation shall be paid semimonthly and in cash as a restraint upon the freedom of such corporations to make any contract to pay the wages of their employees otherwise than semimonthly and in cash. If this were not the necessary construction, the legislation in question would present no serious constitutional difficulty. If we were at liberty to hold that the requirement for semimonthly cash payments was to apply only in cases where it was not stipulated otherwise in the contract of employment, neither the railroad companies nor their employees would have even any plausible cause for complaint, inasmuch as both master and servant would be left at liberty to make any contract they pleased in regard to the time when the servant's wages should be payable and the medium in which they should be paid. The substance of the grievance which is asserted in behalf of the corporations in this litigation is that they are left

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no option in the matter, but must pay in the method and medium prescribed, although their employees might be entirely willing to agree otherwise. Their contention is that the labor law deprives them of the right of making contracts with their employees on advantageous terms, and that this is beyond the power of the Legislature. Of course, if there is no power in the Legislature thus to limit the right of contract between steam surface railroad corporations and their employees, this legislation must fall.

The section of the labor law requiring the cash payment of wages applies to manufacturing, mining, quarrying, mercantile, railroad, street railway, canal, steamboat, telegraph, telephone, and express companies; every corporation engaged in harvesting and storing ice; every water company not municipal; and every person, firm, or corporation engaged in any public work for the state or any municipal corporation. This section is much wider in its application than the clause prescribing the semimonthly payment of wages, which relates only to "every person or corporation operating a steam surface railroad."

These enactments are attacked as unconstitutional on three grounds. It is contended, first, that they deprive the plaintiff and its employees of liberty and property without due process of law; secondly, that they deny them the equal protection of the laws; and, thirdly, that they constitute a restriction upon interstate commerce. Although the argument has covered a wide field an analysis of the discussion resolves the defense into two propositions of law: (1) That the legislation which is the subject of attack is a proper exercise of the reserved power to amend corporate charters contained in the state Constitution; and (2) that it constitutes a proper and legitimate exercise of the police power of the state. If either of these propositions is sound, the legislation is constitutional, and the judgment must be affirmed.

In this state, since the enactment of chapter 381 of the Laws of 1889, many classes of corporations, including steam surface railroad companies, have been required by law to pay their employees in cash. An act to provide for the weekly payment of wages by corporations was passed in the following year (Laws 1890, c. 388), and amended three years later (Laws 1893, c. 717), but steam surface railroads were expressly excepted from its operation. In 1895, however, the act of 1890 was amended so as to provide, among others things, as follows: "Every person or corporation operating a steam surface railroad shall on or before the twentieth of each month pay the employees thereof the wages earned by them during the preceding calendar month, unless any such employee shall be absent from his regular place of labor at the usual time of payment, in which case payment shall be made at any reasonable time thereafter upon demand." Laws 1895, c. 791, § 1. The monthly payment system thus prescribed for

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steam surface railroads continued down to the time of the enactment of the provision of the labor law which is now assailed, providing that the wages of the employees of such corporations shall be paid semimonthly. The term "employee" as used in the labor law is defined by the statute itself to mean "a mechanic, workingman or laborer who works for another for hire" (section 2); and a question is raised as to whether this definition is broad enough to include conductors, trainmen, or locomotive engineers. It is alleged by the appellant and conceded by the respondent that it will cost the railroad company \$5,000 a month more to pay its employees semimonthly than it does to pay them monthly.

In the briefs of counsel the constitutionality of the "semimonthly cash payment law" (which term I use for convenience in referring to the provisions of the statute prescribing the time of payment and requiring it to be in cash) is discussed in two aspects; (1) As an exercise of the police power of the Legislature, and (2) as an exercise of the reserved power to amend the charters of corporations. In the view which I have taken of the case I shall proceed to consider only the question of its validity as warranted by the reserved power to amend.

It is true as has already been pointed out that the statutory requirement of semimonthly payments applies to every person as well as to every corporation operating a steam surface railroad, thereby referring no doubt to the operation of short branch lines by individuals or partnerships in connection with the great railroads of the state, for convenience in sending freight to and from the premises of extensive manufacturing concerns. Such branch lines are only incidental to the general railroad business of the state, and the number of employees thereon must be comparatively few. The constitutionality of the statute is not questioned here by any individuals operating lines of this character, and, even if the enactment should be deemed unconstitutional so far as persons are concerned, the provision relating to them is readily separable from the rest of the statute relating to corporations, and its invalidity in this respect, if so adjudged, need not affect the application of the provision to steam surface railroad corporations. *Berea College v. Kentucky*, 211 U. S. 45, 29 Sup. Ct. 33, 53 L. Ed. 81. It matters not that both provisions are contained in the same section. *Loeb v. Columbia Township Trustees*, 179 U. S. 472, 490, 21 Sup. Ct. 174, 45 L. Ed. 280.

In exercising the reserved power to amend corporate charters, the Legislature may not deprive a corporation of property already acquired, or the proceeds of lawful contracts previously made, or destroy or substantially impair the purposes of the grant or rights which are vested in the corporation thereunder; but it may make any alteration or amendment of a charter "which will not defeat or substantially impair the object of the grant, or any rights vested under it, and which the Legislature may deem

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necessary to secure either that object or any public right.” *Close v. Glenwood Cemetery*, 107 U. S. 466, 476, 2 Sup. Ct. 267, 27 L. Ed. 408. In the case of corporations such as railroad companies, which are clothed to some extent with a public trust, and are under an obligation to discharge duties which affect the community at large, the Legislature may make amendments in furtherance of the public interest for the benefit of their employees, even though such amendments operate as limitations upon the exercise of the right to contract. Such is substantially the doctrine enunciated in the case of *St. Louis, Iron Mountain & St. Paul Ry. Co. v. Paul*, 173 U. S. 404, 19 Sup. Ct. 419, 43 L. Ed. 746, where the Supreme Court of the United States was called upon to pass on the constitutional validity of an act of the Arkansas Legislature which required railroad companies, whenever they discharged an employee, to pay him his unpaid wages then earned at the contract rate without abatement or deduction on the day of his discharge. The state court upheld this legislation as a valid exercise of the power to amend corporate charters reserved to the Legislature in the state Constitution. It was contended in the Supreme Court of the United States that as to railroad corporations organized prior to its passage the statute was void, because in violation of the fourteenth amendment; or, in other words, because it amounted to a deprivation of property forbidden by the federal Constitution. The court, however, declined to sustain this view, but affirmed the judgment of the Supreme Court of Arkansas holding that inasmuch as the right to contract was not absolute, but might be subjected to the restraints demanded by the safety and welfare of the state, the legislative power to amend corporate charters in this manner could not be disputed on the ground that its exercise was an infraction of the fourteenth amendment.

In the *Sinking Fund Cases*, 99 U. S. 700, 720 (25 L. Ed. 496), the same court in discussing the power reserved to Congress to amend the charters of the great Pacific railroads, reviewed the earlier decisions on the general subject, and held that the reservation of the power of amendment “affects the entire relation between the state and the corporation, and places under legislative control all rights, privileges, and immunities derived by its charter directly from the state;” citing *Tomlinson v. Jessup*, 15 Wall. 459, 21 L. Ed. 204.

In this state the same rule has been laid down with equal emphasis. As illustrations of the extent to which the Legislature might subject corporations to new restrictions or increased burdens in the exercise of its reserved power to amend corporate charters, Judge Denio, in *Albany Northern R. R. Co. v. Brownell*, 24 N. Y. 345, called attention to one case in which the Court of Appeals had held that the line of a plankroad might be extended and its capital increased, and to another in which a bank-

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ing corporation chartered under the general act of 1838, without personal liability on the part of the shareholders, was so changed as to render the shareholders liable for all the debts of the company to an amount equal to the stock held by them respectively. See *Schenectady & S. Plankroad Co. v. Thatcher*, 11 N. Y. 102; *Matter of Oliver Lee & Co.'s Bank*, 21 N. Y. 9. "It is difficult to put precise limits upon the power of the Legislature thus reserved over corporations created by it or under its authority," said Judge Earl in *Mayor, etc., of N. Y. v. Twenty-Third St. Ry. Co.*, 113 N. Y. 311, 317, 21 N. E. 60, 62. " * * * As it has the power utterly to deprive the corporation of its franchise to be a corporation, it may prescribe the conditions and terms upon which it may live and exercise such franchise. It may enlarge or limit its powers, and it may increase or limit its burdens." The appellant complains because the Legislature has increased its burdens by the sum of \$60,000 additional expenses which it must incur annually in order to pay its employees with the frequency prescribed by the statute; but the incorporators must be deemed to have contemplated the possibility of any change of burden within the legislative power to make when they organized the railroad company.

In New York a special charter may be amended by a general act which does not refer specifically to such charter. *Pratt Institute v. City of New York*, 183 N. Y. 151, 75 N. E. 1119; *People ex rel. Coper Union v. Gass*, 109 N. Y. 323, 23 N. E. 64, 123 Am. St. Rep. 549. The case of *State v. Haun*, 61 Kan. 146, 59 Pac. 340, 47 L. R. A. 369, is cited as authority against this method of amendment, but it is in opposition to the view repeatedly asserted and assumed in this court, and is also opposed to decisions on the subject in other jurisdictions, where it is held that the fact that an act of the Legislature is general in its terms, and makes no direct or express reference to the charter of any particular corporation does not prevent it from operating as an amendment to the charter of any corporation comprehended in the classes to which it refers. Such was the effect given by the Supreme Court of the United States to a general statute of Kentucky, which was construed as operative to amend the charter of Berea College, although it was not in terms designated as an amendment thereof. *Berea College v. Kentucky*, *supra*.

In Massachusetts a general statute relative to railroad crossings was held to operate as an amendment to the act incorporating the Boston & Providence Railroad Corporation, under the reserved power of the Legislature to alter or amend corporate charters. *City of Roxbury v. Boston & Providence Railroad Corporation*, 6 Cush. (Mass.) 424. Similarly it has been held in Maine that an act, general in its terms and applicable to all railroads, affects the charter of any railroad company which contains no express limitation to the contrary, and may be passed in

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the exercise of the legislative power to modify all charters of corporations. *Bangor, Oldtown & Milford R. R. Co. v. Smith*, 47 Me. 34.

The semimonthly payment clause of the labor law being applicable to all steam surface railroad corporations in the state operated as a repeal of all the charters of such corporations, if there were any, which provided for a different time of payment for employees and as an amendment or addition to all charters in which no time of payment was prescribed. That the Legislature by enactments designed to operate prospectively, and not interfering with vested rights, may thus regulate contracts between corporations and their employees in regard to the times when their wages shall be paid, has been expressly held in Massachusetts and Vermont. Statutes requiring corporations to pay their employees in lawful money have been sustained as falling within the reserved power to amend charters in Vermont and Maryland and by the Supreme Court of the United States as falling within the police power in a case which arose in Tennessee. *Knoxville Iron Co. v. Harbison*, 183 U. S. 13, 22 Sup. Ct. 1, 46 L. Ed. 55.

In 1895, under a provision of the Constitution of Massachusetts permitting such procedure, the justices of the Supreme Judicial Court of that state were requested to give their opinion to the House of Representatives upon the question whether it was within the Constitutional power of the Legislature to extend the application of an existing law relative to the weekly payment of wages by corporations to private individuals and partnerships as provided in a bill then pending before the Legislature. In response to the request the justices transmitted to the House of Representatives an opinion in which their conclusion was expressed as follows: "Without attempting to define the limits of the power of the General Court [the Legislature] in Massachusetts to control the right of its inhabitants to make contracts generally, we cannot say that a statute requiring manufacturers to pay the wages of their employees weekly is not one which the General Court has the constitutional power to pass if it deems it expedient to do so." *Opinions of Justices*, 163 Mass. 589, 40 N. E. 713, 28 L. R. A. 344. This opinion was signed by all the members of the Supreme Judicial Court, including Mr. Justice Oliver Wendell Holmes, now an associate justice of the Supreme Court of the United States. In reference to the conclusion reached, however, it is important to note, what the justices themselves expressly point out, that the legislative power granted to the General Court by the Constitution of Massachusetts is more comprehensive than that found in the Constitutions of some of the other states. The Legislature is empowered to pass all manner of wholesome and reasonable laws "so as the same be not repugnant or contrary to this Constitution, as they shall judge to be for the

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good and welfare of this commonwealth and for the government and ordering thereof, and of the subjects of the same." The judges further say that the considerations which may cause the Legislature to determine what legislation is required by good public policy as thus defined are not for the court to weigh except so far as may be necessary to determine whether the legislation proposed is repugnant or contrary to the Constitution.

The weekly payment act of Vermont (Laws 1906, No. 117) provides that a mining, quarrying, manufacturing, mercantile, telegraph, telephone, railroad, or other transportation corporation, and an incorporated express, water, electric light or power company doing business in the state shall pay each week, in lawful money, each employee engaged in the business, the wages earned by such employee to a date not more than six days prior to the date of such payment; provided that, if at any time of payment an employee is absent from his regular place of labor, he shall be entitled to such payment on demand. It prohibits the payment of the employees of any such corporation in script, vouchers, due-bills or store orders, except in the case of a co-operative corporation in which the employee is a stockholder; and it provides that no corporation shall require an agreement from an employee to accept wages at any period as a condition of employment. *Lawrence v. Rutland R. R. Co.*, 80 Vt. 370, 383, 67 Atl. 1091, 1094 (15 L. R. A. [N. S.] 350).

In the case cited, while the reserved power of amendment was most strongly asserted, it was said to be, like the police power, limited by the requirements of the public good. "And that the act is within the scope of that power cannot be doubted, for its requirement, especially as far as it relates to the defendant and to the class to which it belongs, which are clothed with a public trust and discharge duties of public concern, affecting the community at large—is promotive of the public good in protecting their employees to the limited extent it does." In the same case it is held that the medium of payment is as much within the scope of the reserved power of amendment as the time of payment. The opinion deals so fully and admirably with every substantial question involved in the present appeal, that it is difficult to add anything of value to the argument of Chief Justice Rowell in support of legislation of this character.

An act of the Maryland Legislature passed in 1880 (Laws 1880, c. 273), provided that every corporation engaged in mining or manufacturing or operating a railroad in Allegany county and employing 10 hands or more should pay its employees the full amount of their wages in legal tender money of the United States. The Union Mining Company, a corporation within the purview of the act, was the defendant in a suit brought to test its constitutionality. It was conceded that the Legislature when it incorporated the Union Mining Company reserved the right to

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alter or amend its charter at pleasure. Hence, said the Maryland Court of Appeals, there could be no doubt "that the Legislature could enact a law prohibiting the corporation from paying its employees otherwise than in money, and that it could forbid the corporation from making contracts with them for payment in anything but money." *Shaffer & Munn v. Union Mining Co.*, 55 Md. 74.

The discussion thus far has related to the contention of the appellant that the enactments in question deprive the parties of liberty and property without due process of law. The objection that they operate as a denial of the equal protection of the laws is equally untenable. A classification of corporations with reference to their relations to the public is manifestly reasonable. No other corporations occupy precisely the same relation to the public as steam surface railroad companies, and the fact that no other corporations may have been subjected to the same requirement in respect to the payment of wages does not invalidate the requirement. As long as the classification has a basis in reason, and all corporations of the same class are treated alike, the action of the Legislature may not be condemned by the courts for inequality.

As to the objection that the semimonthly payment law constitutes an unconstitutional interference with interstate commerce, it is to be observed that it is not in conflict with any legislation by Congress, nor does it affect interstate commerce directly. It relates to the wages of railway servants employed wholly within the state of New York as well as to the wages of those whose duties take them from this state into others. The subject is one upon which Congress has not undertaken to act. The cases in which state legislation has been judicially condemned for interference with the commercial power of Congress have been cases where the interference was direct. "In conferring upon Congress the regulation of commerce, it was never intended to cut the states off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country. Legislation, in a great variety of ways, may affect commerce and persons engaged in it without constituting a regulation of it, within the meaning of the Constitution." *Sherlock v. Alling*, 93 U. S. 99, 103, 23 L. Ed. 819. If its effect upon interstate commerce is only incidental a state law is not forbidden by the commerce clause of the federal Constitution, and may remain in force until and unless it is displaced by a congressional enactment dealing with the subject-matter. *Nashville, C. & St. L. Railway v. Alabama*, 128 U. S. 96, 9 Sup. Ct. 28, 32 L. Ed. 352. "While the laws of the states must yield to acts of Congress passed in execution of the powers conferred upon it by the Constitution, the mere grant to Congress of the power to regulate commerce

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with foreign nations and among the states did not, of itself and without legislation by Congress, impair the authority of the states to establish such reasonable regulations as were appropriate for the protection of the health, the lives and the safety of their people." *New York, New Haven & Hartford R. R. Co. v. New York*, 165 U. S. 628, 631, 632, 17 Sup. Ct. 418, 420, 41 L. Ed. 851. Neither did it impair the authority of the states to amend the charters of corporations partly engaged in interstate commerce so as to promote the welfare of their employees under "the power remaining with the state to regulate the relative rights and duties of all persons and corporations within its limits." Until Congress shall intervene to regulate the payment of wages by interstate carriers, I think such state enactments as that under consideration are free from the objection that they constitute commercial regulations solely within the power of the federal government to prescribe.

In reaching the conclusion that the New York statute requiring steam surface railroad corporations to pay their employees semi-monthly and in cash is a valid enactment under the reserved power of the Legislature to amend corporate charters, I have not overlooked the cases in which similar legislation has been condemned in other jurisdictions. I will now refer to the decisions of this character which seem most worthy of notice.

The case of *Godcharles v. Wigeman*, 113 Pa. 431, 6 Atl. 354, involved the constitutionality of the Pennsylvania store order act of 1881, which declared that all orders given by manufacturers to their workmen payable in goods or anything other than money to be void, and prohibited the use of such orders in the payment of wages by manufacturers to their employees. The Supreme Court declared that this was an attempt by the Legislature to do what cannot be done in this country; that is, prevent persons who are sui juris from making their own contracts. Mr. Justice Gordon said: "The act is an infringement alike of the right of the employer and the employee; more than this, it is an insulting attempt to put the laborer under a legislative tutelage which is not only degrading to his manhood, but subversive of his rights as a citizen of the United States." The case contains nothing bearing upon the exercise of the reserved power to amend corporate charters, but is simply a denial that the legislation which was the subject of criticism could be enacted in the exercise of the police power.

An act to provide for the weekly payment of wages by corporations passed by the Illinois Legislature in 1891 was held to be unconstitutional in the case of *Braceville Coal Co. v. People*, 147 Ill. 66, 35 N. E. 62, 22 L. R. A. 340, 37 Am. St. Rep. 206, on the ground that it did not apply to all corporations existing within the state or to all that had been or might be organized for pecuniary profit under the general incorporation laws of the

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state. The Constitution of Illinois provides: "No corporation shall be created by special laws or its charter extended, changed or amended, * * * but the General Assembly shall provide by general law for the organization of all corporations hereafter to be created." Const. art. 11, § 1. The Supreme Court of Illinois held that this provision of the Constitution required all amendments to charters of existing corporations to be made by general laws applicable alike to all existing under the same conditions; and that inasmuch as the weekly payment law could apply to particular corporations only and not to the general body of corporations it could not be upheld.

The Revised Statutes of 1889 (sections 7058, 7060) in Missouri made it a misdemeanor for any corporation, person or firm engaged in manufacturing or mining to issue in payment of the wages of laborers any order, check, memorandum, token or evidence of indebtedness payable otherwise than in lawful money of the United States, unless the same were negotiable and redeemable at its face value in cash, goods or supplies at the option of the holder at the store or other place of business of the employer. The Supreme Court of Missouri held that this was class legislation and violative of the constitutional guaranty of due process of law. The court conceded that the Legislature might regulate the business of mining and manufacturing so as to secure the health and safety of the employees, but it denied that such was the scope of the enactment in question. The legislation was condemned on the ground that it denied to persons engaged in mining and manufacturing the right to make and enforce the most ordinary, everyday contracts—a right which is accorded to all other persons. "This denial of the right to contract," says the opinion, "is based upon a classification which is purely arbitrary because the ground of the classification has no relation whatever to the natural capacity of persons to contract." *State v. Loomis*, 115 Mo. 307, 315, 22 S. W. 350, 352, 21 L. R. A. 789. There was an able dissenting opinion, in which it was strongly argued that statutes designed to prevent fraud or oppression in the payment of wages in mining and manufacturing enterprises are not objectionable on the ground of the selection or classification of those enterprises as subjects for separate legislation.

An Indiana statute requiring all employers of labor to make weekly payment of the wages due their employees was adjudged unconstitutional as not falling within the police power in *Republic Iron & Steel Co. v. State*, 160 Ind. 379, 66 N. E. 1005, 62 L. R. A. 136. There, as the court said, the statute took away "from both the employer and employee, whether in the shop, in the store, or on the farm, all power to contract for labor, except upon terms of weekly payment in cash," and this was pronounced an unreasonable and therefore unconstitutional restric-

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tion. No question of the reserved power to amend corporate charters appears to have been considered.

Perhaps the strongest authority in favor of the appellant in any state court of last resort is *Johnson v. Goodyear Mining Company*, 127 Cal. 4, 59 Pac. 304, 47 L. R. A. 338, 78 Am. St. Rep. 17, which invalidated a California statute requiring every corporation doing business in the state to pay the wages of its employees in lawful money or checks negotiable at their face value on demand, and which gave the employee a preferential lien on all the property of the corporation for the amount of his wages. It was held that such legislation could not be upheld under the reserved power to amend or on any other theory. On the other hand, the same statute had previously been adjudged to be constitutional by the Circuit Court of the United States in *Skinner v. Garnett Gold Mining Co.*, 96 Fed. 735.

Again and again the courts of this country have asserted the proposition, in almost every form in which the English language can phrase it, that it is their duty to uphold a statute enacted by the Legislature as constitutional if it is possible to do so without disregarding the plain command or necessary implication of the fundamental law. If the lawmakers have not violated the Constitution their work must stand until they themselves destroy it, no matter what the courts may think of its wisdom or probable effect. "The courts have no right to arrest or nullify a law passed in relation to a subject within the legislative authority on the ground that it conflicts with their notions of natural right, absolute justice or sound morality." *Slack v. Jacob*, 8 W. Va. 612. There is an irreconcilable conflict in the decisions indifferent jurisdictions as to the constitutional validity of labor legislation fixing the medium and time of payment of the wages of those who work for corporations. After the foregoing review of the leading cases, I find no difficulty in sustaining our New York statute on the ground which has been stated. It does not confiscate corporate property directly or indirectly. It does impose a greater future burden upon the corporations to which it relates; but that, I think, is within the power of the Legislature to the extent to which it has been exercised in this case.

For the foregoing reasons, I advise the affirmance of this judgment, with costs.

CULLEN, C. J., and GRAY, WERNER, HISCOCK, and CHASE, JJ., concur.

Judgment affirmed.

WHITE v. MISSOURI, K. & T. R. Co.

(Supreme Court of Missouri, June 21, 1910. Rehearing Denied July 20, 1910.)

[130 S. W. Rep. 325.]

Constitutional Law—Class Legislation.—Rev. St. 1899, §§ 3447, 3448 (Ann. St. 1906, p. 1981; Rev. St. 1910, §§ 2427, 2428), providing that garnishment shall not issue in a cause where the sum demanded is not over \$200, and where the property sought to be reached is wages due the defendant from a railroad, till after judgment is recovered by plaintiff against defendant, and in such a case relieving the garnishee railroad of the duty to answer, do not constitute arbitrary class legislation; they not being, except incidentally, in favor of railroads and creditors for greater amounts, but being in favor of railroad employees of small wages, and there being reason for such a classification.

Woodson and Gantt, JJ., dissenting.

In Banc. Appeal from Circuit Court, Pettis County; Louis Hoffman, Judge.

Garnishment by E. C. White against the Missouri, Kansas & Texas Railroad Company. From an adverse judgment, garnishee appeals. Reversed.

Geo. P. B. Jackson, for appellant.

E. C. White and Barnett & Barnett, for respondent.

VALLIANT, J. Plaintiff brought suit by attachment in a justice's court against one York on a promissory note for \$58.40 and interest. The railroad company was summoned as garnishee. There was no personal service of process on York. He was brought in by publication only on the constable's return of non est. No appearance for him was entered, and nothing of his was reached by the attachment except the debt which the railroad company, the garnishee, owed him. The garnishee by its answer to the interrogatories admitted that it was "indebted to the defendant E. P. York, a married man, the head of a family, and a resident of the state of Missouri, in the sum of \$76.90, amount is for services rendered by defendant to this garnishee during the month of October, 1903, and will be due and payable on or about the 1st day of November, 1903. Said sum is for wages earned during the 30 days next preceding its becoming due." The garnishee's answer then stated that no judgment had been rendered against the defendant, that the amount claimed by plaintiff being less than \$200, and the amount the garnishee owed defendant being for wages owing him as an employee of the railroad company, it was not subject to garnishment, but was exempt

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therefrom under the provisions of sections 3447 and 3448, Rev. St. 1899 (Ann. St. 1906, p. 1981). There was no denial of the garnishee's answer. The justice rendered judgment against the garnishee for \$76.90, and the latter appealed. When the cause reached the circuit court, the plaintiff filed a motion for a judgment against the garnishee on the admission of the indebtedness in its answer, notwithstanding the provisions of sections 3447 and 3448, Rev. St. 1899, which plaintiff alleged were unconstitutional because they were in conflict: First, with certain sections of the state Constitution, to wit, section 53, art. 4 (Ann. St. 1906, p. 197), "The General Assembly shall not pass any local or special law" in reference to certain subjects specified, among which is: "Granting to any corporation, association or individual any special or exclusive right, privilege or immunity." Second, section 30, art. 2 (Ann. St. 1906, p. 166): "No person shall be deprived of life, liberty or property without due process of law." Third, section 4, art. 2 (page 128): "All persons having a right to life, liberty and the gains of their own industry." Also in conflict with the fourteenth amendment of the federal Constitution: "Nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law." The circuit court sustained the motion and rendered judgment against the garnishee, holding that the statute in question was unconstitutional. From that judgment the garnishee prosecutes this appeal.

There is no dispute of the facts stated in the garnishee's answer. If the sections of the statute in question are in violation of any of the provisions of the Constitution, state or federal, set out in the motion, the judgment should be affirmed; if those sections were the result of a lawful legislative power, the judgment should be reversed.

The two sections of the statute being sections 3447 and 3448, Rev. St. 1899 (Ann. St. 1906, p. 1981), now section 2427 and 2428, Rev. St. 1910, are as follows:

"Sec. 3447. Garnishment not to issue, when railroad corporation.—That hereafter no garnishment shall be issued by any court in any cause where the sum demanded is two hundred dollars or less, and where the property sought to be reached is wages due the defendant by any railroad corporation, until after judgment shall have been recovered by the plaintiff against the defendant in the action.

"Sec. 3448. Railroad not required to answer, when.—No railroad corporation shall be required to make answer to any interrogatories propounded to it, in any action against any person to whom it may be indebted on account of wages due for personal services, nor shall any default or other liabilities attach because of its failure to so answer in such cases, where a writ of garnishment

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was issued or served in advance of the recovery by the plaintiff against the defendant, in any action for two hundred dollars or less; and any judgment rendered against any railroad corporation for its said failure or refusal to make answer to any garnishment so issued or served before the recovery of final judgment in the action between the plaintiff and defendant in the cases mentioned in section 3447, shall be void, and any officer entering said judgment or who may execute the same shall be taken and considered a trespasser and in addition thereto may be enjoined by any court having jurisdiction."

Whilst there are three sections of the state and one of the federal Constitution violated by this statute, according to the motion filed by the plaintiff in the circuit court, yet, according to the oral argument and brief in his behalf in this court, the whole contention is narrowed down to the proposition that it is arbitrary class legislation. According to respondent's brief, the statute violates the fourteenth amendment, "in that it arbitrarily undertakes to separate wage-earners who are in the employ of a railroad corporation from other classes of people and even other wage-earners; and it violates section 53, art. 4, because it grants to the railroad company immunity from garnishment not granted to others." Just how it deprives the plaintiff of his property without due process of law, or how it deprives him of his natural right to life, liberty, and gains of his industry, there is no suggestion in his brief, and we perceive no such possible effect. But the argument is: It is class legislation; it shuts the plaintiff off from pursuing his writ of garnishment against an employee of a railroad company when under like circumstances he could attach the wages of an employee of any other kind of corporation or of an individual; it shuts him off from running the garnishment to recover his small debt, whereas, a creditor with a debt of over \$200 could go in and recover; and it shuts him off from pursuing a railroad company, whereas, if it were any other kind of employer, the process of garnishment could be used. That is the epitome of the argument.

The class marked out for favor in the statute is the class of railroad employees covered by its terms. Incidentally the railroad company receives the favor of freedom from the annoyance which constant calls to answer as garnishee would entail; but the persons really protected are the employees whose wages, when they are absent or have no notice of a suit, cannot be attached. Section 3447 says that, when the amount sought to be recovered from the employee is \$200 or less, his wages shall not be touched by garnishment until there has been a judgment for the amount against him. Of course there can be no judgment against him until he has been served with summons. The statute means that the process of garnishment should be withheld until the em-

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ployee is brought into court and is allowed to make his defense, if any he has, and a personal judgment rendered against him. The next section 3448 is but a corollary to the former and is designed to secure its performance, to render more certain the accomplishment of its purpose.

It is earnestly argued that the statute is vicious class legislation because it is in the interest of railroad corporations, shielding them as a class from the process of garnishment, while all other corporations and individuals are liable to that process. And to exemplify this position attention is called to the fact that it is the railroad company, and not the employee, that is prosecuting this appeal; and not only that, but attorneys of other railroad companies have asked and obtained leave to come in as amici curiæ and file briefs and make oral arguments to sustain the statute. The railroad company is the only party to this suit who had the right to appeal or bring the cause to this court, because it is the only party against whom or against which the judgment was rendered. But, aside from that, it seems like a narrow view to attribute no other motive than that of a pecuniary interest to this railroad and the other railroad companies who have shown an interest in this case. The only selfish interest a railroad company could have in the matter is to be freed from the annoyance of being constantly called into court to answer as garnishee. Its real pecuniary interest is but little, if any. If it owes the employee, it can bring the amount into court and be paid out of the fund in its hands for the expenses it has incurred for answering; if it owes nothing, or if the amount it owes is not sufficient to pay what the court allows for the expense of answering, the garnishee recovers judgment therefor from the attaching creditor. In the contemplation of the law of garnishment the garnishee is not, in the first instance, considered as an adverse party in the litigation. He is a disinterested stakeholder ready to pay what he owes, and to pay it to whom the court decrees. He becomes an adversary only when a dispute arises over his answer. But the interest taken by the railroad companies in the subject of this suit is not to be attributed alone to their desire to avoid annoyance. It is the duty of the master to protect his servant. Perhaps, in a case like this, such is not the master's duty to the extent that he would be liable if he failed to give such protection; but above his legal liability he has a moral duty to protect his servant when it comes in his way to do so, which, whether he can be compelled to perform it or not, is of sufficient consideration to justify his conduct when he does perform it. This moral duty, if we call it nothing else, is especially incumbent on railroad corporations. Their employees, particularly those composing their train crews, are often men of little means, small wages, and in the performance of their work are carried hundreds of miles away from their homes. They are more helpless

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in many respects than men engaged in other kinds of business. They especially need protection, and, if in such case the master will not protect his servant, who will protect him? We can see in the subject now under consideration a blended interest of master and servant with the servant's share in the interest alone likely to suffer if the master withholds his protection.

It is said that, if the statute is unconstitutional, it is immaterial whether its purpose be to protect one class or another, the railroads or their employees, and that is so. But when the validity of the statute is assailed on the ground that it is class legislation, it is important to ascertain what class is created, so that we can see whether there was legal justification for making the class. Statutes have been enacted and held to be valid which make railroad companies a class; but the same reason that would justify making railroads a class would not always justify bringing other concerns into that class. Our fellow-servant statute of 1897 is an example of that kind of legislation. And the statute giving railroad companies the power to condemn a right of way 100 feet wide through your land creates railroad companies into a class for that purpose. But there were good reasons for that classification; reasons which would justify the imposing of the burden upon the class in the one statute and the conferring of the power in the other; reasons that would not justify the inclusion of other concerns in either of those classes.

In the case at bar, if the purpose of the statute in question was to create railroad companies into a class, to exempt them from the burden or from the inconvenience of answering as garnishees, no one would undertake to defend it as a reasonable classification. But who will undertake to say that the General Assembly intended by this act to create railroad companies into a privileged class, to exempt them from the common burden borne by everybody else? When in the legislative history of this state has the General Assembly ever manifested such partiality to railroad companies as a class, partiality in which there was no purpose but to favor the class, granting to them a special privilege without any conceivable benefit to the public? On the other hand, when we think of the employees, their peculiar helpless condition, in the predicament contemplated by this statute, we see a very good reason for the classification. A man at home, or whose place of business is near his home, can attend the justice's court when he is sued and, either with or without an attorney, defend against an unjust suit. But if an unfair plaintiff has a small claim against a brakeman on a freight train against which claim he knows there is or may be a good defense, he may watch a time when the brakeman is gone, give constructive notice by publication, seize his wages, and thus obtain an unconscionable advantage. Even if the publication was brought to the notice of the railroad employee, when per-

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haps he was 500 miles away from home and could not leave his post of duty without sacrificing his position, it is easy to conceive how he would submit to wrong rather than undertake the expense and trouble of defending the suit for the small amount involved, small perhaps in comparison to the expense and trouble, though not small in comparison to his wages. The law contemplates that a man can ordinarily be found by the sheriff or constable in the county in which he lives, and if he cannot be found the law provides for constructive notice to him as to one who absconds or conceals himself to avoid the writ, and, as a general rule, that is fair. But is it fair to this class of men? Are they to be put in the category of men absconding or hiding from the sheriff or constable? Or if the General Assembly should undertake to give them as a class certain exemption from that condition, can we say that it is arbitrary classification?

The record in this case illustrates what advantage may be taken of a railroad employee but for this statute. The defendant in this case is a resident of this state. Then why was the time to sue chosen when he was absent, and when only constructive notice, which in fact is often no notice, could be given? So far as this record shows, this man knew nothing of this suit; but, if this law will not protect him, his wages are to be gathered in by the adroit plaintiff whether he owed the debt or not. This case illustrates only one aspect of the condition to which the statute was designed to apply. It applies as well to a nonresident railroad employee as to a resident. A man living in Texas having a disputed claim against a railroad trainman who lives in the same town may send his claim to Missouri, where it is likely the defendant may never be, and institute suit by attachment, and the defendant never hear of it until his pay day comes and he finds that his wages have been appropriated. Is it possible the lawmaking power of this state cannot regulate the process of the courts of the state to prevent such an abuse of the law?

Without the statutory provision of garnishment a creditor would have no right to seize the wages of his debtor until after he obtained judgment on his debt. The statute granting the right may direct how and to what extent it may be used, and a person using the process given him by the statute has no right to complain of the restrictions or conditions imposed by the very same law that gives him the right. We do not mean to imply that a statute evidently designed to give one class of creditors the property of their debtor and withhold it from another class would not be obnoxious to the Constitution, state and federal; but we do say that in giving such process to creditors as our garnishment statutes give it is in the power of the General Assembly to make reasonable exceptions, and the creditor using the process has no right to complain of the exception.

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The statute in question, designed as an amendment to the statute regulating the process of garnishment, was enacted in 1899 (Acts 1899, p. 221). It consists of two sections only, the first, which is section 3447, Rev. St. 1899, now section 2427, Rev. St. 1910, is in these words: "That hereafter no garnishment shall issue by any court in any cause when the sum demanded is two hundred dollars or less, and when the property sought to be reached is wages due the defendant by any railroad corporation, until after judgment shall have been recovered by the plaintiff against the defendant in the action." The whole force and effect of the act is contained in that section. If the second section had been omitted entirely, the purpose of the act would have been accomplished completely. The effect of the first section was to forbid the issuance of a writ of garnishment in such case. Such a writ issued in violation of the terms of that section would be an illegal writ, under which no right could be acquired, no obligation imposed. The party protected was the man whose wages were thereby shielded. The class created was the class composed of such men. The law which exempts to a servant his wages or shields his wages from legal process cannot be said to be a law for the benefit of the master. The second section (section 3448, Rev. St. 1899, now section 2428, Rev. St. 1910) is designed only to aid in the practical accomplishment of the purpose contained in the first section. It authorizes the railroad company to ignore a writ of garnishment, if one, issued in violation of the express terms of the first section, should be served on it. There is just this much protection to the railroad company in that provision, and no more, to wit, but for that provision the railroad company would be bound to answer the writ or, failing, let a judgment by default go against it. But surely it cannot be said that the General Assembly violates the Constitution when it says that the railroad company may ignore a writ which the law has expressly forbidden to issue. If it be said that the exemption applies only to railroads, the answer is: It is against railroads only that the writ in such case can go. The wages of a servant can be reached only by garnishing the master. We are satisfied that the class intended to be benefited by the act was of railroad employees, that the railroad companies are only relatively concerned, and if protected it is so only incidentally, and in furtherance of the protection designed for the employees. And we are also satisfied that the well-known conditions that surround the employees of the railroad companies are sufficient to justify the General Assembly in making a class of them for the purpose indicated.

It is suggested that but for this statute a resident employee of the said railroad company whose wages are exempt from execution or attachment might be sued by attachment in another state through which the railroad ran, his wages be there seized

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by garnishment, and the company be compelled by judgment to pay the same to the plaintiff in that suit, and thereafter the employee could sue here and recover; thus the railroad company would be subject to two judgments for the same debt, ergo, this statute is for the benefit of the railroad company. If the statute, although aimed to protect the employees, should incidentally afford the railroad companies protection from such a wrong, it would be no reproach to the statute. But no such purpose can be gathered from the reading of the statute, and, besides, it confers no such protection. It does not prevent a creditor suing the employee in another state and there seizing his wages by garnishment, nor does it prevent the employee from afterwards suing for wages at his own home in this state. But in such case, independent of this statute, the judgment of the court in the other state, if it was a court of competent jurisdiction, would be a perfect defense to the subsequent suit here, by force of section 1, art. 4, Const. U. S., requiring each state to give "full faith and credit to the * * * judicial proceedings of any other state."

The power of the General Assembly to enact class legislation has so often been considered by this court that we deem it necessary now to do no more than to refer to some of the cases. The well-established doctrine of this court on that subject is that class legislation is not an offense against the Constitution of the state or of the United States if it is based on reason, and if it includes all persons or corporations coming within the reason. It is impossible to make all laws applicable to all persons or corporations; classes in fact exist, and laws must be made to apply to them as classes. The General Assembly does not really create the class, although we usually speak of it in that way. The class exists by its very nature or inherent conditions, and the lawmaker recognizes the fact and makes the law to suit. If there is reason why a law should be made to apply to a particular class, the lawmaking department of the state government has authority to make it unless it is otherwise prohibited by the Constitution. *Humes v. Railroad Co.*, 82 Mo. 231, 52 Am. Rep. 369; *Daggs v. Insurance Co.*, 136 Mo. 382, 38 S. W. 85, 35 L. R. A. 227, 58 Am. St. Rep. 638; *Geist v. St. Louis*, 156 Mo. 647, 57 S. W. 766, 79 Am. St. Rep. 545; *Mamman v. Coal Co.*, 156 Mo. 232, 56 S. W. 1091; *State ex rel. v. Henderson*, 160 Mo. 216, 60 S. W. 1093. Those are a few of the decisions on this subject, but are not all that have been cited by the learned counsel for appellant, as reference to their briefs will show; but they are sufficient. Decisions of the Supreme Court of the United States are also cited to the same effect and answer respondent's contention in reference to the federal Constitution.

Respondent relies with confidence on the decision of this court in *Re Flukes*, 157 Mo. 125, 57 S. W. 545, 51 L. R. A. 176, 80

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Am. St. Rep. 619. In that case the Legislature, in section 2356, Rev. St. 1899 (Ann. St. 1906, p. 1451), had undertaken to make it a misdemeanor for any person holding a claim for a debt owing by a person resident in this state to send it out of the state for the purpose of instituting suit on it in the foreign jurisdiction and there attaching by process of garnishment against the debtor's employer the wages due him when the employer was a resident of this state and could be served with process here. In that statute the Legislature was making an effort to extend its arm across the state boundary line and prevent a creditor from using the courts of another state for the collection of his debt. There was some discussion of the class feature of the statute; but the decision really turned on the point that the statute attempted to abridge the right of the citizen under the federal Constitution to go anywhere he chose in the United States and institute his suit, without being subject to indictment and punishment.

But it is argued that, conceding the railroad employees constitute a class justifying special legislation in their behalf, this statute is bad because it does not embrace all railroad employees. If the reasons for class legislation as above discussed are observed, the Legislature might recognize the existence of a class within a class; for a class within a class is but a class, and it may be as well marked as is the larger class out of which it is formed, and if the statute embraces all those who come within its reason it is not obnoxious to the Constitution. The argument is that this statute reaches only those railroad employees whose debts amount to \$200 or less, and that drawing the line at that maximum figure is arbitrary. If that fact creates a class within a class, it cannot be denied that the statute reaches every one within that interior class. In point of fact the statute applies to every railroad employee who is sued by attachment for a sum not exceeding \$200. It was evidently the purpose of the Legislature to provide for cases when the amounts sued for were so small that the defendants could not afford to abandon their posts of duty and come at a great distance and expense to defend the suits. If that was the purpose of the law, the lawmaker had to draw the line at some point to designate what was considered a small amount; and, whenever the line might have been drawn, it would have been subject to the same criticism that is now made. If the line had been drawn at \$25 or \$50, it would not have protected one who was sued for \$26 or \$51.

If the Legislature had authority to pass a statute affording protection to the class of persons named, it had the authority to draw the line, and the courts have no authority to question the wisdom of their demarcation. A statute designed to shield the wages of a railroad employee without limit as to the amount sued for, shielding the salaries of the big as well as the wages

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of the little, could not stand, because there would be no reason or justice on its face. But a statute aimed to protect an employee from an abuse of the process of garnishment on a claim too small to justify him in leaving his post and coming a distance to make his defense has both reason and justice to support it; in fact, the statutes concerning garnishments, without this provision, would be a weapon that could be used to great injustice, and we doubt not that it was to prevent that abuse that this act was passed. We must remember that this act does not deprive the creditor entirely of the writ of garnishment in such case, but only postpones him until he gets a judgment on his claim. It is argued that this statute applies to all railroad employees regardless of their station or the amount of their wages, the line being drawn only at the amount of the debt sued for, and that therefore it cannot be said that it was aimed to cover only the small wage-earner. That is an argument on the letter rather than on the spirit of the law. *Qui hæret in litera, hæret in cortice*. Who can read this statute without seeing that it was to protect that class of small wage-earners whose calling carried them away from home, and who can reflect on it without seeing that that is its practical effect? If the statute had gone on to specify the amount of wages the man was to earn in order to come within its terms, the same criticism that is now made in reference to the amount of the debt sued for would be made in reference to the amount of wages specified. If the statute drew the line at \$60 a month, the complaint would be that it excluded from its protection the man whose wages were \$61 a month. If the law-maker thought that a station agent or a clerk in an office, or a man whose position was high enough to command a large salary, was not as apt to be subjected to the abuse that the statute was aimed to correct as one whose duties called him away from home, and for that reason left the statute more general than it might have been, we cannot say that the conclusion was unreasonable, nor can we condemn the statute because possibly it might cover a case not contemplated. When a statute is designed to correct a well-known evil, there is no use to incumber it with words to exempt from its effect a condition which, though possible, is unlikely, and which would rarely, if ever, occur.

It is argued also that this statute by an arbitrary line creates a class of preferred creditors allowing those whose claims are for \$201 or more free to sue out a writ of garnishment, while excluding those whose claims are \$200 or less. Whatever may be said as to the effect of the statute, it certainly cannot be claimed that its purpose was to give one class of creditors a privilege over another class. It is as difficult to imagine that the General Assembly had in mind the intention to create a

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preferred class of creditors, drawing the line at \$201, as it is to imagine the intention to create a particularly preferred class consisting alone of railroad companies. The purpose of the statute was not to prefer a class of creditors or a class of railroads, and, if the effect is to give an incidental preference to creditors whose claims are more than \$200, that consequence cannot defeat the statute if its purpose was to accomplish an object which the General Assembly had a right to accomplish and in the main does accomplish. As already said there would be neither reason nor justice in withholding the writ of garnishment from all creditors, regardless of the amount of their claims, and thus shield the large salaries as well as the little wages; but there is both reason and justice in withholding from the creditor, whose claim is so small as to not justify the defense, involving abandonment of post as well as expense, the right to seize the wages of the debtor until his claim is in judgment, and, as also already said, if the aim was to cover only such small cases, the line had to be drawn somewhere, and it was for the lawmaker to say where.

This statute is not designed to shield a railroad employee from the payment of an honest debt, but only to protect him from the abuse that might be made of the writ of garnishment to his injury in his absence. It gives him a chance to be heard before his wages are taken, a chance he would be less likely to have, on account of the nature of his daily work, than persons engaged in other business. We hold that sections 3447 and 3448, Rev. St. 1899, now sections 2427 and 2428, Rev. St. 1910, are not obnoxious to any of the mandates of either the state or federal Constitution.

The judgment is reversed.

FOX, C. J., and LAMM and GRAVES, JJ., concur. GANTT and WOODSON, JJ., dissent in dissenting opinion by WOODSON, J. BURGESS, J., not sitting.

MOBILE & O. R. Co. *et al.* v. BROWNSVILLE LIVERY & LIVE STOCK Co.

(Supreme Court of Tennessee, Sept. 7, 1910.)

[130 S. W. Rep. 788.]

Carriers—Power to Limit Liability.*—A common carrier may for sufficient consideration limit its liability for injury or loss of property, except where such loss occurs through its own negligence.

Carriers—Limited Liability—Consideration—Sufficiency.†—A reduced freight rate, or an agreement to transport over its own line and that of a connecting carrier, is a sufficient consideration to enable a common carrier to limit its liability for loss or injury to property.

Carriers—Notice of Claims—Contracts—Validity.‡—The contract of carriage of live stock, providing that, in case of loss or injury to them, it shall be a condition precedent to recovery therefor that a notice in writing of the claim be given to the agent of the railroad delivering the stock, wherever such delivery may be, before the stock is removed or intermingled with other live stock, being clear and reasonable, is enforceable.

Appeal from Circuit Court, Haywood County; John R. Bond, Judge.

Action by the Brownsville Livery & Live Stock Company against the Mobile & Ohio Railroad Company and another. Judgment for plaintiff, and defendants appealed to the Court of Civil Appeals. On affirmance of the judgment, the case was brought to the Supreme Court by certiorari. Judgments reversed, and suit dismissed.

C. G. Bond and H. J. Livingston, for plaintiffs.
Bate Bond and A. M. Marr, for defendant.

PER CURIAM. This action was brought to recover damages for injuries alleged to have been inflicted by the Mobile & Ohio Railroad Company and the Louisville & Nashville Railroad Company in the transportation of stock from East St. Louis, Ill., to

*For the authorities in this series on the question whether a common carrier of freight may limit its liability, see second foot-note of *Summerlin v. Seaboard A. L. Ry.* (Fla.), 31 R. R. R. 657, 54 Am. & Eng. R. Cas., N. S., 657; second foot-note of *Bartlett v. Oregon R. & N. Co.* (Wash.), 35 R. R. R. 400, 58 Am. & Eng. R. Cas., N. S., 400.

†See extensive note, 28 R. R. R. 384, 51 Am. & Eng. R. Cas., N. S., 384.

‡See first foot-note of *Cleveland, etc., Ry. Co. v. Rudy* (Ind.), 35 R. R. R. 120, 58 Am. & Eng. R. Cas., N. S., 120; first foot-note of *Atlantic C. L. R. Co. v. Bryan* (Va.), 33 R. R. R. 655, 56 Am. & Eng. R. Cas., N. S., 655.

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Brownsville, Tenn., over the several lines of these two companies. Upon the trial of the case, the last-named company was released from liability, and a verdict returned and a judgment thereon entered against the Mobile & Ohio Railroad Company. From this judgment an appeal in error was prosecuted to the Court of Civil Appeals, when the same was affirmed. The case is before us by grant of the writ of certiorari.

The shipment of this stock was made in a car which the shipper, at the time the animals were placed in it, examined, and it was found to be in all respects suited to receive and transport them. It is true, also, that the animals themselves were in good physical condition. In placing them in the car, however, Mr. Cooper, of the defendant in error company, who purchased and superintended loading them in the car, testifies that, discovering that two were inclined to "bite," he caused them to be tied or haltered, one in each end of the car. The other animals were unfastened. The testimony is uncontradicted that the car in which this shipment was made came through in due time, and without any jolt or jar which would have affected the safe transit of the stock to Humboldt, Tenn., where it was delivered to the connecting carrier, the Louisville & Nashville Railroad. After thus receiving the car, it was, without delay, passed over the line of that road to Brownsville, the terminal point of shipment. It reached that place about dark, and the consignee, the defendant in error, immediately took charge of the car, and removed the stock to its barn or stable. Upon their removal, it was discovered that three of the animals were badly cut on their legs, and a fourth had a swollen place in its side, which is variously stated by the witnesses to have been from 6 to 8 inches to 24 inches in length. This action was brought to recover the value of the animal last referred to, which died, as is alleged, from the effect of the injury described, within a few days after being received, and also damages for the injury to the three others.

The shipment of this stock was upon a limited liability contract, signed by a representative of the Brownsville Livery & Live Stock Company and the agent of the plaintiff in error. This representative—a member of the consignee company—says that he did not read the contract before attaching his signature to it, yet he concedes that he had often shipped stock on contracts which were similar. No claim is made that there was any effort made by the agent of the railroad to mislead or force upon the shipper this particular contract. In addition, the attention of the shipper was called to the fact that an election was given to take this contract with limited liability at a reduced rate, or else an open one with common-law obligations. This was done, by large red capitals at the head of the bill of lading in question.

By the ninth section of this contract it is provided "that, as

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a condition precedent to any right to recover any damages for loss or injury to said live stock, notice in writing of the claim shall be given to the agent of the railroad actually delivering said stock, wherever such delivery be made, and such notice shall be given before said live stock is removed or is intermingled with other live stock."

The record shows that the animals were removed from the car by the defendant in error, taken to its stable or barn, in which other animals were, and that notice of the injury, now complained of, was not given until the following day.

At the close of the testimony, the defendant companies moved the trial judge for a peremptory instruction, which was declined. Pretermittting other objections made to the contract in this cause in the lower court, we will confine our attention to the error assigned upon the refusal to grant this motion.

It is firmly established as a rule of law, in this state, that a common carrier may for a sufficient consideration limit its liability for injury to or loss of property delivered to it for transportation, save that such limitation shall not exempt it from the consequences of its own negligence, or that of its servants; and a reduced freight rate, or an agreement to transport over its own line and that of a connecting carrier, will constitute such a consideration. Among the cases announcing this rule, reference is made to *Dillard Bros. v. L. & N. R. R.*, 2 Lea, 289; *Railway Co. v. Manchester Mills*, 88 Tenn. 655, 14 S. W. 314; *Railroad v. Stone & Haslett*, 112 Tenn. 352, 79 S. W. 1031.

Among the conditions found in a limited liability contract for the carriage of property, we had occasion during the Nashville term, 1908, of this court, to consider the reasonableness of one similar in tenor and effect to the one set out above, and it was there held the provision was valid, and that a failure to comply with it, in such a case as is the present, was a defense which the carrier could successfully make to an action brought by the consignee, based on alleged negligence, causing injury to stock in transit.

It has been held that a stipulation requiring notice to be given within a limited time of a claim against a telegraph company for negligence in sending or delivering a message was reasonable. Such stipulations are frequently found in contracts with express companies and other quasi public corporations, and these have been recognized as binding. In *Blackman v. Casualty Co.*, 117 Tenn. 578, 103 S. W. 784, it was held that a provision in a policy, requiring written notice of any disease insured against to be given to the insurer within 10 days after its contraction, and making such notice a condition precedent to the right of recovery, was valid, and that a failure to give the notice operated as a forfeiture of the policy.

If such stipulations are enforceable, we can see no reason why

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a provision such as that in question should not be held valid. There may occur cases where its enforcement would be unreasonable, as, for instance, where injuries were not easily discoverable by mere inspection. But, where the injuries complained of are external and visible upon ordinary examination, as were those upon the bodies of these animals, we can see no reason why it should not be recognized as valid. It imposes no unnecessary burden on the consignee of stock, while it is evident that by a failure to give notice promptly the carrier is at disadvantage, and is more or less exposed to the peril of fraudulent claims, made at a time so long after the delivery of the stock claimed to be injured that an intelligent investigation of the claim is difficult, if not impossible. If a notice given one day after the receipt and removal of stock will suffice, then equally would notice to the carrier months after the stock were removed be sufficient. Given, however, before or at the time of their removal, the agent of the carrier has an opportunity of examination, with the view of seeing the extent of the injury, and of ascertaining whether the animals were sound, or not, at the time of their delivery of carriage, while delay, from the many transactions of a similar character which the carrier has, would render it impossible, as is clear, to make a satisfactory investigation of one as to which complaint is made. As against consignees, to which class, unquestionably, the defendant in error belongs, there may be no necessity for such a provision. But the rule covers both honest as well as dishonest shippers, and, if reasonable, as we hold it to be, must be applied to all alike.

The validity of such a provision has been recognized in *Schonhoff v. Railroad*, 135 Mo. App. 705, 117 S. W. 113, *George v. Railroad*, 214 Mo. 551, 113 S. W. 1099, 127 Am. St. Rep. 690, and *Moore v. St. Louis, etc., R. R. Co.*, 127 S. W. 921.

We do not regard the case of *Smith v. Railroad Co.*, 86 Tenn. 198, 6 S. W. 209, as a controlling authority against this conclusion. While holding in that case a provision in the policy there in question, "that as a condition precedent to his right to recover any damages for loss, or injury, to said stock, he will give notice in writing of his claim thereof to some officer of said party of the first part, or its nearest station agent, before said stock is removed," etc., was unreasonable, as we understand from the opinion, because "uncertain and ambiguous," yet this qualifying sentence is found: "We do not mean to hold that in no case can a carrier stipulate time for notice of loss, or injury, if it be reasonable, definite, and certain in its terms, pointing out specifically its mode of execution."

The provision in the present case falls within this qualifying clause. It is clear and unambiguous, pointing out distinctly the manner as well as the party to whom it shall be given.

We think, therefore, that there was error in the judgment of

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the Court of Civil Appeals, affirming that of the circuit court, and that this latter court erred in declining to grant the motion of the plaintiff in error for a peremptory instruction in its favor.

Both judgments are therefore reversed and the suit is dismissed.

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(Supreme Court of Utah, Sept. 2, 1910.)

[110 Pac. Rep. 983.]

Appeal and Error—Review—Presumptions—Findings.—In the absence of objections to findings, they are presumed to have been sustained by the evidence.

Appeal and Error—Review—Presumptions—Findings.—In the absence of a request for additional findings, the findings made are presumed to be as broad as the evidence warranted.

Appeal and Error—Rulings Reviewable.—The Supreme Court cannot on appeal from a judgment for defendant review action in not specially finding on a question of negligence when the pleadings support the judgment on another theory, and where there is no complaint that the findings are not supported by the evidence, or that the court failed to find on a material issue.

Carriers—Freight—Right to Limit Liability.*—A carrier of freight by a fair and reasonable contract can limit his common-law liability as an insurer.

Contracts—Failure to Read—Effect.—One may be bound by the terms of a contract which he did not read.

Carriers—Freight—Value.—A valuation of \$5 per hundredweight, to which the liability of a carrier of household goods, "consisting of a roll of carpet, including one feather bed, 4 pillows, and three boxes of other household goods," was limited, was not so inadequate as to be fraudulent on its face, or show valuation below actual value.

Carriers—"Household Goods."—Wearing apparel is not necessarily included within the term "household goods," when the question of good faith or fraud in fixing the value of such goods in a contract for carriage is involved.

Carriers—Freight—Federal Statute—Applicability.—Act Feb. 4, 1887, c. 104, § 20, 24 Stat. 386 (U. S. Comp. St. 1901, p. 3169), as amended by Act June 29, 1906, c. 3591, § 7, 34 Stat. 593 (U. S. Comp. St. Supp. 1909, p. 1163), making carriers liable for freight lost in interstate shipment, does not prevent a reasonable contract limiting a carrier's liability for injury to freight to a particular valuation per hundredweight in consideration of a reduced freight rate.

*See first foot-note of preceding case.

Larsen v. Oregon Short Line R. Co

Appeal from District Court, Third District; T. D. Lewis, Judge.

Action by Clara Larsen against the Oregon Short Line Railroad Company. Judgment for defendant, and plaintiff appeals. Affirmed.

A. F. Thomas, for appellant.

P. L. Williams, Geo. H. Smith, and H. B. Thompson, for respondent.

FRICK, J. Appellant in her complaint in substance alleged: That on the 29th day of May, 1907, she was the owner of certain household goods, "consisting of a roll of carpet, including one feather bed, 4 pillows, and three boxes of other household goods, which upon said date she delivered into the said defendant's (respondent's) possession as a common carrier, at Blackfoot, Idaho, to be safely carried to Salt Lake City, Utah." That respondent's charges for freight for transporting said goods, and which appellant paid to it, amounted to \$2.03. "That defendant did not safely carry said goods but while said goods were in the possession, custody, and control of said defendant * * * said goods became wholly lost to this plaintiff." Appellant alleged the reasonable value of the goods, and prayed for judgment for such value, together with the freight paid as aforesaid. Respondent admitted that it carried on the business of a common carrier in the states of Idaho and Utah, and denied every other allegation in the complaint. As an affirmative defense respondent averred that, at the time and place stated in the complaint, it had received certain goods from appellant which were consigned to her at Salt Lake City, and which goods respondent undertook to transport as a common carrier for hire; that at the time said goods were accepted for shipment "the plaintiff (appellant) agreed with the defendant that, in consideration of a lower rate being applied to said shipment than would otherwise be charged by the said railroad company, the defendant agreed that the value of said property did not exceed \$5 per hundredweight, and thereby assumed all risks necessary to receive such benefit of reduced rates; that said goods were of a gross total weight of 290 pounds, which at \$5 per hundredweight, would amount to \$14.50, and for which amount this defendant acknowledged itself to be indebted to the plaintiff, and hereby tenders said sum, together with the sum of \$2.03, freight charges heretofore paid by plaintiff to defendant." To this defense appellant filed a reply in which she denied the foregoing averments, but further stated "that on receipt or bill of lading given to this plaintiff there may have been certain needle eye lettered stipulations somewhat to the effect as it is set out in said answer." It is further alleged in the reply that said alleged agreement was "without consideration, * * * unfair, unreasonable, and unlawful, and fraudulent,

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and against public policy." The case was tried and submitted to the court without a jury. The court, in substance, found that at the time and place alleged in the complaint appellant was the owner of certain household goods and wearing apparel of the value of \$117, weighing 290 pounds; that said property was at the time and place alleged in the complaint delivered by appellant to respondent to be safely carried to Salt Lake City, Utah; that appellant paid respondent as charges for transporting said goods the sum of \$2.03 which respondent accepted, and issued to appellant a certain bill of lading, upon the back of which was an agreement or stipulation "which was in plain large type, separated from any other stipulation of the contract or bill of lading and separately signed." The stipulation referred to is as follows: "Release. I hereby certify, that I desire to receive the benefit of any lower rate provided for freight conditional upon carrier being released, or at owner's risk; and in consideration of such lower rate being applied on the within named shipment, I hereby assume all risk necessary to receive such benefit. It is also hereby agreed that the value of the property does not exceed \$5.00 per hundredweight. May 29, 1908. Clara Larsen, Shipper." The court further found that respondent's agent handed appellant said bill of lading, and that she signed her name thereto without reading or knowing the contents thereof; that at Blackfoot, Idaho, where appellant shipped her goods, respondent kept a book, which was in the possession of said agent, containing the different freight rates or charges for shipments "of the same articles under different liabilities for loss by the defendant, if it should occur, and any person upon request had access to said book; but no discussion occurred there between the plaintiff and defendant's agent relating to different rates;" that the goods shipped by appellant and delivered to respondent as stated were never delivered to appellant and were wholly lost to her. Upon these findings, the court made conclusions of law as follows: "That said release or agreement in said bill of lading, signed by said plaintiff, wherein the limitation of defendant's liability for loss is placed at \$5 per hundredweight, is fair, equal, reasonable, and valid, and therefore binding. That said plaintiff is entitled to recover for the goods lost at the rate of \$5 per hundredweight, and \$2.03 freight charges, the amount tendered by defendant." Judgment was duly entered in accordance with the conclusions of law. The appeal is upon the judgment roll, without a bill of exceptions.

Counsel for appellant in his assignment of errors complains only of the conclusion of law and the judgment based thereon. He contends that the court erred in enforcing the agreement set forth in the findings of fact wherein the parties agreed upon and fixed the value of the household goods. It is asserted that this contention is supported by what is decided in the case of *Houtz v.*

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U. P. Ry. Co., 33 Utah, 175, 93 Pac. 439, 17 L. R. A. (N. S.) 628, where in passing upon the question whether a common carrier of property could by contract in advance limit or avoid liability for injury and consequent damages to property transported caused by negligence or misconduct of the carrier or its servants, and where the rule adopted by us is stated in the headnotes as follows: "A carrier cannot by contract exempt itself from, nor limit its liability for, the loss of or damage to property caused by its negligence or misconduct, or that of its servants." The question passed on there is, however, not presented in this case; and in order to avoid, if possible, all confusion respecting the rule based on our conclusions in this case, we have, in substance, set forth all of the material allegations of the complaint, the material averments of the answer and reply, and have likewise given the substance of all of the material findings of fact, and have given the conclusions of law in full. The findings of fact are not assailed; hence we much assume that they are in accordance with the evidence, and, in the absence of any requests upon the part of appellant to have the court make a finding upon the question of negligence, we may infer that the findings were satisfactory to both parties and in fact are as broad as the evidence warranted. At all events we cannot review the action of the court in not specially finding upon the question of negligence when, as in this case, the pleadings support the judgment upon another theory, and where there is no complaint made that the findings are not supported by the evidence, or that the court failed to find upon a material issue. Taking the pleadings, the findings, and conclusions of law together, it is beyond doubt that the case was tried and determined upon the theory that respondent, as a common carrier, in receiving the goods in question for transportation, became an insurer of their safe delivery at Salt Lake City, and that in case of respondent failing to deliver them safely regardless of all negligence on its part it nevertheless was liable to appellant for the agreed value of the goods. In other words, the court, under the issues, held respondent liable upon its contract as an insurer, and not as a tort-feasor for negligence or misconduct. Upon the other hand, the court held that under contract the appellant was bound by the value of the goods as stipulated therein.

In view of the foregoing, the doctrine contained in the quotation taken from the headnotes of the Houtz Case, *supra*, has no application. This case, however, falls squarely within another rule which is also referred to in the Houtz Case, namely, that a common carrier of property by a fair and reasonable contract, when fairly entered into may in advance limit his common-law liability as an insurer of the property received for and transported by him. See, also, upon this point *Benson v. O. S. L. R. Co.*, 99

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Pac., where, at page 1074, numerous cases upon this point are cited by Mr. Justice McCarty. There was no issue in this case that the contract was obtained by fraud or misrepresentation. The contract was entered into as contracts frequently are by one of the parties omitting or neglecting to read it before signing to it. That a party may be bound by the terms of a contract which he did not read is elementary, and in the nature of things must be so. In this case, therefore, there was a special agreement by which the value of the goods to be transported was fixed and which the shipper signed when the goods were received for shipment by the carrier, and in which agreement the shipper also stipulated that, by reason of the reduced freight charges, the goods should be transported at the shipper's risk. The court construed this contract to mean that in consideration of the reduced freight charges appellant could recover only the value of the goods as fixed in the agreement of shipment. Counsel does not complain that the court misconstrued this contract, but what he complains of is that the court erred in enforcing it. In this connection it is contended that the valuation of \$5 per hundred-weight was upon its face fraudulent because household goods are necessarily worth more than that amount per hundredweight. When recourse is had to the description of the goods as contained in the complaint, we think this contention is not well founded. The household goods are described as a "roll of carpet, including one feather bed." A "roll of carpet" is very indefinite both as to quality and value. It may well be that a given roll of carpet may be of great weight but of small value. By simply looking at it may well be that no one could tell its real value; at least, there is absolutely nothing in this record from which is made to appear that the respondent's agent knew, or was in possession of information from which he ought to have known, the real value of the "roll of carpet." The feather bed was "included" in the roll of carpet. It does not even appear that the agent knew that there was a feather bed; nor is there anything to show that the agent knew the contents of the three boxes, except that they contained "household goods." Counsel's contention that from these meager facts and circumstances we should hold as a matter of law that respondent's agent knew the real value of the goods, and that the contract limiting their value was entered into without regard to the real value thereof, is clearly untenable. It was an easy matter for counsel to have alleged the facts in this regard, and thus have given the respondent an opportunity to join issue with appellant with respect thereto, and, in such event, to have the court find the facts in accordance with the evidence. Such a course would have been fair to all concerned, and would have presented the question for review.

In addition to all this, the court finds that the shipment included wearing apparel. Nothing is said about wearing apparel

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in the complaint, and whether the respondent's agent knew that the roll of carpet or a box contained wearing apparel is not made to appear. Nor can it be determined from the findings or otherwise how much of the value found by the court consisted of wearing apparel. We are hardly prepared to hold that wearing apparel is necessarily included within the general term "household goods," when the question of good faith or fraud is involved in fixing the value of such goods.

Nor can we agree with counsel for appellant that the contract is forbidden, and therefore void by reason of what is contained in Act Feb. 4, 1887, c. 104, § 20, 24 Stat. 386 (U. S. Com. St. 1901, p. 3169), as amended by Act June 29, 1906, c. 3591, § 7, 34 Stat. 593 (U. S. Comp. St. Supp. 1909, p. 1163), and as found in section 6440 of Pierce's United States Code of 1910. It is clear that the provisions of the section just referred to were not intended to cover contracts like the one in question. The construction and application of that section was squarely presented to and decided by the Supreme Court of New York in the case of *Greenwald v. Weir*, 130 App. Div. 696, 115 N. Y. Supp. 311, decided March 5, 1909. In that case it is held that the section just referred to has no application to contracts like the one in question. In the headnote of that case it is also said: "Where the written receipt constituting a contract of shipment contains a clause by which the shipper agrees that the value of the property is not more than a stated sum unless a different value is stated, and no greater value is stated, the shipper stipulates and represents, as one of the terms of the contract that the goods are not of a greater value than the sum stipulated, and is estopped from claiming in case of loss that the value was greater." We can see no good reason why a shipper should not be bound by a contract if fair and reasonable, and, when fairly entered into, in which he agrees that, in consideration of a reduction of the freight charges, the carrier shall be released from liability in case of loss except for the value agreed upon. No doubt if such an agreement were entered into for ulterior purposes, or if based upon fraud or misrepresentation of any kind, and such an issue were presented and sustained, no court would enforce such a contract. In the absence of any evidence involving bad faith, and where the contract is neither opposed to public policy nor prohibited by statute, the courts cannot declare it void.

The question whether contracts like the one passed on are enforceable in cases where the property is lost through the negligence or misconduct of the carrier or its agents is not involved, and hence is not passed on.

In view of the whole record, the judgment ought to be, and it accordingly is, affirmed, with costs to respondent.

STRAUP, C. J., and McCARTY, J., concur.

ATLANTA & W. P. R. Co. *v.* JACOBS' PHARMACY Co.

JACOBS' PHARMACY Co. *v.* ATLANTA & W. P. R. Co.

(Supreme Court of Georgia, Sept. 21, 1910.)

[68 S. E. Rep. 1039.]

Carriers—Failure to Perform Duty—Actions—Pleading.—When a plaintiff elects to bring an action against a railroad company for damages arising from a failure on its part to perform its duty as a common carrier, instead of suing on a contract of affreightment, it is not incumbent on him to set out the precise terms of such contract. *Louisville & Nashville R. Co. v. Cody*, 119 Ga. 371, 46 S. E. 429.

(a) In *Louisville & Nashville Railroad Co. v. Warfield*, 129 Ga. 473, 59 S. E. 234, one of the rulings made in the *Cody* Case, *supra*, was overruled; but the decision on the point dealt with in the above headnote was not overruled.

Carriers—Limitation of Liability for Negligence.—By Civ. Code 1895, § 2264, it is declared that a common carrier "as such is bound to use extraordinary diligence. In cases of loss the presumption of law is against him, and no excuse avails him unless it was occasioned by the act of God or the public enemies of the state."

Carriers—Limitation of Liability for Negligence.—Under Civ. Code 1895, § 2265, "in order for a carrier or other bailee to avail himself of the act of God or exemption under the contract as an excuse, he must establish not only that the act of God or excepted fact ultimately occasioned the loss, but that his own negligence did not contribute thereto."

Carriers—Limitation of Liability for Negligence.—Construing the sections above cited in connection with section 2276, it has been established that, as a general rule, a common carrier may relieve itself by express contract from its common-law liability as an insurer, but cannot relieve itself from liability for damages resulting from its own negligence. *Georgia Railroad & Banking Co. v. Keener*, 93 Ga. 808, 21 S. E. 287, 44 Am. St. Rep. 197; *Central of Georgia Railway Co. v. Hall*, 124 Ga. 322, 52 S. E. 679, 4 L. R. A. (N. S.) 898, 110 Am. St. Rep. 170; *Southern Express Co. v. Hanaw*, 134 Ga. 445, 67 S. E. 944, and cases there cited, including *The Kensington*, 183 U. S. 263, 268, 22 Sup. Ct. 102, 46 L. Ed. 190, *Alabama Great Southern R. Co. v. Little*, 71 Ala. 611, and *Louisville and Nashville R. Co. v. McGuire & Co.*, 79 Ala. 395.

(a) The rulings in regard to limiting liability except for gross negligence in contracts for the transportation of live stock will not be extended so as to include the transportation of goods generally by common carriers. Moreover, such contracts in regard to live stock have been dealt with by statute. Civ. Code 1895, § 2313 et seq.

Carriers—Carriage of Goods—Care Required.—The diligence re-

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quired of a common carrier in regard to preserving goods in the course of transportation by him from loss by fire is not limited to avoid setting fire to such goods, but extends also to protecting and preserving them from destruction after a peril from fire has become apparent. *Richmond & Danville R. Co. v. White*, 88 Ga. 805, 15 S. E. 802.

Carriers—Carriage of Goods—Loss during Transportation—Liability.*—If the loss was caused by the wrong or fault of the shipper, without negligence on the part of the carrier, the latter will not be responsible; as, for instance, if the shipper or his agent should improperly pack the goods by reason of which breakage occurs.

Carriers—Carriage of Goods—Loss during Transportation—Actions—Burden of Proof.†—If a common carrier relies upon the defense that the loss was occasioned by the fault of the shipper or his agent, he must, as in the case where he relies upon the loss having occurred by the act of God or the public enemy, bring himself within the defense by negating contributing fault on his own part. *McCarthy v. Louisville & Nashville R. Co.*, 102 Ala. 193, 14 South. 370, 48 Am. St. Rep. 29; *Grey's Executor v. Mobile Trade Co.*, 55 Ala. 387, 28 Am. Rep. 729; *South & North Ala. R. Co. v. Henlein*, 52 Ala. 606, 23 Am. Rep. 578, 584; 4 Elliott on Railroads, § 1492.

Carriers—Carriage of Goods—Loss during Transit—Liability.—If a shipper is guilty of negligence in packing a car, and from breakage of certain of the goods a fire originates therein, and if, after knowledge by the carrier of the existence of the fire, the condition is such that the goods may be preserved, or the fire extinguished, by the use of extraordinary care on his part, he will not be relieved from liability, if he is negligent in this regard, by setting up the original negligence of the shipper in loading the car prior to the beginning of the transportation.

Charge Not Ground for New Trial.—In the light of the pleadings and evidence, of the entire charge of the court, and of the note appended to the ground of the motion for a new trial on that subject, the charge complained of in reference to the measure of damages was not such as to require a new trial.

Negligence—Carriers—Appeal and Error—Reservation of Grounds of Review—Question for Jury—"Extraordinary Diligence."—Except where a particular act is declared, either by statute or a valid municipal ordinance, to constitute negligence, the question as to what

*See extensive note, 11 R. R. R. 419, 34 Am. & Eng. R. Cas., N. S., 419; *Harrington v. Wabash R. Co.* (Minn.), 33 R. R. R. 625, 56 Am. & Eng. R. Cas., N. S., 625; second head-note of *Weisenger v. Southern Ry. Co.* (Ky.), 31 R. R. R. 42, 54 Am. & Eng. R. Cas., N. S., 42; foot-note of *Cleveland, etc., Ry. Co. v. Louisville T. & S. Co.* (Ky.), 30 R. R. R. 672, 53 Am. & Eng. R. Cas., N. S., 672.

†For the authorities in this series on the subject of the necessity of pleading absence of contributory negligence, see *Evansville & T. H. R. Co. v. Bernd* (Ind.), 34 R. R. R. 535, 57 Am. & Eng. R. Cas., N. S., 535.

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acts do or do not constitute negligence is for the determination of the jury; and it is error for the presiding judge to instruct them what ordinary care or extraordinary care requires to be done in a particular case. *Atlanta & West Point R. Co. v. Hudson*, 123 Ga. 108, 51 S. E. 29.

(a) Extraordinary diligence is defined as "that extreme care and caution which very prudent and thoughtful persons use" under like circumstances. Civ. Code 1895, § 2899. In determining what very prudent and thoughtful persons would do under certain circumstances, the situation and surrounding facts, including the existence of an emergency, if there was one, are to be considered.

(b) There was no error in refusing, upon request, to charge that if a conductor of a freight train ascertained that a car was on fire, and an emergency arose without negligence on the part of the defendant, and if the conductor in good faith took a certain course which he thought was that offering the best prospect of saving the goods from destruction, although the course so taken was a mistake, and another course might have been better, "such a mistake is not chargeable to the defendant as an act of negligence."

(c) In the brief of counsel for plaintiff in error it was urged that, if this request was not properly worded, the court should, nevertheless, have charged on the doctrine of emergency; but the motion for new trial contains no such assignment of error as that the court failed entirely to charge on the subject, the only complaint being that the court declined to charge as stated in the written request.

Appeal and Error—Review—Second Verdict for Plaintiff.—No other ground of the motion for a new trial requires a reversal. This being the second verdict found in favor of the plaintiff, the evidence being sufficient to sustain the finding, and the presiding judge having approved it, this court will not interfere.

Cross-Bill—Dismissed.—The judgment complained of in the main bill of exceptions being affirmed, the cross-bill is dismissed.

(Syllabus by the Court.)

Error from Superior Court, Coweta County; R. W. Freeman, Judge.

Action by the Jacobs' Pharmacy Company against the Atlanta & West Point Railroad Company. Judgment for plaintiff, and defendant brings error; plaintiff filing cross-exceptions. Judgment affirmed on main bill of exceptions, and cross-bill dismissed.

Dorsey, Brewster, Howell & Heyman and *W. G. Post*, for plaintiff in error.

John L. Hopkins & Sons and *W. C. Wright*, for defendant in error.

PER CURIAM. Judgment affirmed.

COMMONWEALTH *v.* LOUISVILLE & N. R. Co.

(Court of Appeals of Kentucky, Sept. 22, 1910.)

[130 S. W. Rep. 798.]

Indictment and Information—Negating Statutory Exceptions.—If an exception in a penal statute is contained in the sentence or paragraph that describes the offense, it must be negated in an indictment, but, if it is contained in a separate section or in a distinct proviso or paragraph, it is a matter of defense which need not be negated.

Intoxicating Liquors—Introduction in Prohibition Territory—Indictment—Negating Exceptions.—The first paragraph of Ky. St. § 2569a (Russell's St. § 3641), makes it unlawful to deliver intoxicants in prohibition territory. The second paragraph provides that the act shall not apply to private liquor in personal baggage, nor to certain deliveries to physicians or druggists. Held, that an indictment of a carrier need not negative delivery within the proviso.

Statutes—Validity.—Ky. St. § 2569a (Russell's St. § 3641), making it unlawful to deliver intoxicants in prohibition territory, is not void for uncertainty for prescribing no standard as to what is intoxicating liquor.

Intoxicating Liquors—Definition.—"Intoxicating liquors," as used in Ky. St. § 2569a (Russell's St. § 3641), and other local option legislation, means spiritous, vinous, or malt liquors, by whatever name called, that contain alcohol, and are intended to be or may be used as a beverage, and, when so used, will intoxicate.

Intoxicating Liquors—Introduction in Prohibition Territory—Purpose of Statute.*—A carrier is not punishable under Ky. St. § 2569a (Russell's St. § 3641), prohibiting introduction of intoxicating liquors in prohibition territory, if he exercises good faith in accepting a shipment, and uses ordinary care to avoid violating the statute.

*For the authorities in this series on the subject of the transportation of intoxicating liquors into communities where prohibition is in force, see *Commonwealth v. People's Express Co.* (Mass.), 32 R. R. R. 407, 55 Am. & Eng. R. Cas., N. S., 407 (carrier was liable under certain statutes relating to the transportation of intoxicating liquors into cities, etc.); *Cincinnati, etc., R. Co. v. Commonwealth* (Ky.), 26 R. R. R. 632, 49 Am. & Eng. R. Cas., N. S., 632 (certain act was within Ky. Laws, 1906, p. 320, c. 63, declaring it unlawful for a common carrier to bring into or deliver in any county, etc., where the sale of intoxicating liquor is prohibited, any intoxicating liquor, etc.); *Adams Express Co. v. Kentucky* (U. S.), 25 R. R. R. 132, 48 Am. & Eng. R. Cas., N. S., 132 (materiality in criminal prosecution of fact that express company knew that C. O. D. interstate shipment was not ordered by consignee, etc.); *Louisville & N. R. Co. v. Commonwealth* (Ky.), 24 R. R. R. 572, 47 Am. & Eng. R. Cas., N. S., 572 (on question of good faith of express company, in prosecution of railroad company for permitting express company having office in defendant's building to sell liquor in violation of law, the state should be permitted to show the general manner in which the busi-

Commonwealth v. Louisville & N. R. Co

Appeal from Circuit Court, Lee County.

"Not to be officially reported."

Louisville & Nashville Railroad Company having been indicted for delivering intoxicants in prohibition territory, the indictment was quashed, and the Commonwealth appeals. Reversed, with directions.

James Breathitt, Atty. Gen., and Tom B. McGregor, Asst. Atty. Gen., for the Commonwealth.

Benjamin D. Warfield, Chas. H. Moorman, and Wallace & Harriss, for appellee.

CARROLL, J. The appellee company was indicted under section 2569a of the Kentucky Statutes (Russell's St. § 3641), reading: "It shall be unlawful for any person or persons, individual or corporation, public or private carrier to bring into, transfer to other person or persons, corporations, carrier or agent, deliver or distribute, in any county, district, precinct, town or city, where the sale of intoxicating liquors has been prohibited, or may be prohibited, whether by special act of the General Assembly, or by vote of the people under the local option law, any spiritous, vinous, malt or other intoxicating liquor, regardless of the name by which it may be called; and this act shall apply to all packages of such intoxicating liquors whether broken or unbroken: Provided individuals may bring into such district, upon their person or as their personal baggage, and for their private use, such liquors in quantity not to exceed one gallon; and provided, the provisions of this act shall not apply to licensed physicians or druggists, to whom any public carrier may deliver such goods, in unbroken packages, in quantity not to exceed five gallons at any one time." The lower court sustained a demurrer to the indictment upon the ground that it failed to charge that the company did not come within the proviso that "the provisions of this act shall not apply to licensed physicians or druggists, to whom any public carrier may deliver such goods, in unbroken packages, in quantity not to exceed five gallons at any one time."

ness of the office was conducted, etc.); *State v. Intoxicating Liquors (Me.)*, 24 R. R. R. 273, 47 Am. & Eng. R. Cas., N. S., 273 (transportation of certain consignment of liquor from office of express company to certain building was part of a continuous interstate shipment, etc.); *American Express Co. v. Iowa (U. S.)*, 15 R. R. R. 268, 38 Am. & Eng. R. Cas., N. S., 268 (intoxicating liquors shipped C. O. D. from one state to another is not subject to seizure while in hands of express company); note appended to *Southern Express Co. v. State (Ga.)*, 16 Am. & Eng. R. Cas., N. S., 179 (carrier of intoxicating liquor as its purchaser's agent); *State v. Intoxicating Liquors (Me.)*, 20 Am. & Eng. R. Cas., N. S., 511 (constitutionality of certain Maine statute prohibiting the bringing of intoxicating liquors into the state); *St. Louis, etc., Ry. Co. v. Gans (Ark.)*, 21 Am. & Eng. R. Cas., N. S., 498 (liability of carrier where intoxicating liquors are seized and destroyed under police regulations).

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It is the contention of the commonwealth that as the exception is not a part of the paragraph of the statute that creates and describes the offense, but is set out in a proviso as well as in a new paragraph, it was not necessary that the indictment should state that the accused did not come within the exception or to negative the proviso. There is some confusion in the authorities upon the question when it is necessary for the indictment to charge that the person accused does not come within a saving clause of the statute under which the indictment is returned, and many of the distinctions made are difficult to understand. But the general rule and the one prevailing in this state is that, if the exception is contained in the sentence or paragraph of the statute that creates and describes the offense, then it must be negatived in the indictment; but if the exception is not found in the sentence or paragraph that creates and defines the offense, but is contained in a separate section or in a distinct proviso or paragraph, it is a matter of defense for the accused, and it is not necessary that the indictment should charge that he did not come within the exception. *Commonwealth v. Kenner*, 11 B. Mon. 1; *Commonwealth v. McClanahan*, 2 Metc. 8; *Commonwealth v. Bierman*, 13 Bush, 345; *State v. Abbey*, 29 Vt. 60, 67 Am. Dec. 759; *Bishop's New Criminal Proced.* § 331 et seq.; *Wharton's Criminal Pl. & Pra.* § 238 et seq.; 22 Cyc. 344. The first paragraph of the section creates and defines the offense. In this paragraph all of the ingredients necessary to constitute the offense are set out without any exception or saving clause. It is true the conditions that exempt the carrier from the operation of this paragraph are a part of the section that creates and describes the offense, but they are contained in a distinct and independent paragraph, added to the section as a proviso. If the first paragraph provided that it should be unlawful for any person or carrier to bring into, transfer, or deliver intoxicating liquor to any person, except licensed physicians or druggists, then it would be necessary to state in the indictment that the person to whom the carrier delivered the liquor was not a licensed physician or druggist, as the exception would be a part of the paragraph creating and describing the offense, as is the case in section 1306 of the Kentucky Statutes, making it a misdemeanor for any person to sell or furnish liquor to a person under 21 years of age, other than his own child, without special written direction so to do from the father or guardian of the infant; and section 1321, providing that "no work or business shall be done on the Sabbath Day except the ordinary household offices or other work of necessity or charity." We therefore conclude that the indictment is sufficient.

It is further urged that the demurrer should have been sustained upon the ground that the statute in question is void for uncertainty because it prescribes no standard as to what is intoxicat-

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ing liquor. We do not think this objection well taken. The statute was intended to prevent the bringing of intoxicating liquors into prohibited territory, and the words "intoxicating liquors," as used in this and other local option legislation, have a well-understood popular as well as legal meaning and refer to spiritous, vinous, or malt liquors, by whatever name called, that contain alcohol, and are intended to be or may be used as a beverage, and, when so used, will produce intoxication. *City of Bowling Green v. McMullen*, 134 Ky. 742, 122 S. W. 823, 23 Cyc. 61; 17 Am. & Eng. Ency. of Law, 197. Whether or not the liquor the carrier is indicted under the statute for carrying is intoxicating liquor or not may in some instances be a question of fact to be determined as are other controverted questions of fact; but this circumstance is not sufficient to condemn the law for want of certainty. The statute applies alone to intoxicating liquor intended to be or that may be used as a beverage. And, if the carrier exercises good faith in accepting the shipment and uses ordinary care to avoid violating the statute, it will not be punishable under it. *Adams Express Co. v. Commonwealth*, 129 Ky. 420, 112 S. W. 577, 33 Ky. Law Rep. 967, 18 L. R. A. (N. S.) 1182. If the words "intoxicating liquor" had been omitted from the statute, and the penalty denounced only against the carrier who brought into prohibited territory spiritous, vinous, or malt liquor, it might in some cases be a question whether or not the liquor was spiritous, vinous, or malt, or either; and this fact would have to be determined as are other similar questions when raised. So that it is not practicable to lay down either in statute or decision any unmistakable or infallible standard by which the carrier may know with absolute certainty whether or not its act will be a violation of the law. The best and only thing that can be done is to describe as accurately as may be the prohibited thing, and this the statute does. The law is as definite as the conditions being dealt with will permit. We do not apprehend that carriers who desire in good faith to observe its provisions and exercise ordinary care to avoid its violation will find serious trouble in saving themselves from the penalties prescribed. Any attempt to make it more precise would render it difficult of enforcement, and be more likely to involve the subject in confusion than it now is.

Wherefore the judgment is reversed, with directions to proceed in conformity with this option.

LEIBENGOOD *v.* MISSOURI, K. & T. RY. CO.

(Supreme Court of Kansas, July 9, 1910.)

[109 Pac. Rep. 988.]

Commerce—"Interstate Commerce"—Regulation of Carriers.*—The act requiring corporations and others operating railroads as common carriers to transport live stock within the state at a speed of not less than 15 miles per hour, unless prevented by some unavoidable cause (Laws 1907, c. 276), does not apply to nor affect interstate commerce, and a shipment of live stock between points in the state which passes for a short distance over the territory of another state is interstate commerce, and noncompliance with the requirements of the statute in such a shipment affords no grounds for recovery against the carrier.

(Syllabus by the Court.)

Appeal from District Court, Miami County; W. H. Sheldon, Judge.

Action by C. E. Leibengood against the Missouri, Kansas & Texas Railway Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

John Madden and *W. W. Brown*, for appellant.

Frank M. Sheridan, for appellee.

JOHNSTON, C. J. This was an action by C. E. Leibengood against the Missouri, Kansas & Texas Railway Company to recover damages resulting from an alleged negligent delay of the railway company in transporting two car loads of cattle from Beagle to Kansas City. The petition was in two counts. The first set forth a cause of action under the common law, and the second a violation of an act requiring common carriers to transport live stock at a speed of not less than 15 miles per hour unless prevented by some unavoidable cause. A recovery was had on the second count, which included damages for delay and attorney's fee, and the railway company appeals.

The contention of appellant is that the shipment of the cattle was interstate, and therefore that the act under which recovery

*See *St. Louis, etc., R. Co. v. State* (Ark.), 31 R. R. R. 666, 54 Am. & Eng. R. Cas., N. S., 666 (a continuous transportation of freight between points within a state is "interstate commerce," where part of the route is outside of the state because of the unsafe condition of a bridge forming part of the line of road in the state between such point); *United States v. Lehigh Val. R. Co.* (N. Y.), 5 R. R. R. 11, 28 Am. & Eng. R. Cas., N. S., 11 (shipment between same points in state is not an interstate shipment because line of road between the terminal points passes through other states); note, 21 Am. & Eng. R. Cas., N. S., 148 (whether shipments between points in same state, but passing through another state, constitute interstate commerce.

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was had is without application. It appears that the shipment in question was from Beagle, a point in Kansas, to and through Missouri for a distance of at least a mile to Kansas City, another point in Kansas. How far the cattle were transported through Missouri is not definitely shown; but the railroad over which the cattle were taken passes out of Kansas at or near Rosedale and re-enters the state near stockyards where they were delivered. The statute under which the recovery was had provides:

"Section 1. That all persons, firms or corporations operating railroads as common carriers shall transport all live stock received by them for transportation within this state without delay, and shall transport the same in a period of time not less than one hour for each fifteen miles of the entire distance over which said shipment of stock is transported by rail within this state; unless prevented by unavoidable cause; provided, the time consumed by stops for watering and feeding, occasioned by the requirements of law or the order of the shipper, shall not be considered a part of the time in which shipments are required to be made.

"Sec. 2. Any common carrier which fails or refuses to transport such live stock at the rate of not less than fifteen miles per hour, as herein provided, shall be liable for all damages which may be sustained by any person on that account, which damages shall include the loss resulting from a depreciation on the market, shrinkage in weight of such live stock, the loss in time of shipper, his agent or employee, and any extra expense occasioned thereby, and all other damages which are the approximate result of such failure, together with the costs in case suit is brought to recover the same, and a reasonable attorney's fee, fixed by the court on the trial of said cause. All other statutory and common-law remedies, in addition to the remedies provided herein, are hereby preserved to the shippers." Laws 1907, c. 276.

Was the shipment from one point in Kansas through a portion of Missouri to another point in Kansas interstate, and, if so, is a state regulation of such a shipment permissible? The shipment sought to be regulated is a single and indivisible thing. The statute purports to regulate the time which shall be consumed from the origin to the end of the transportation. If the carrier fails to transport for the whole distance within the specified time, the prescribed penalties and liabilities attach. It is a regulation of a single act of transportation as a whole, and not a part of it, that may be wholly performed within the state. The effect of the regulation is direct and immediate upon a shipment that is interstate. It is unlike cases of regulating the speed of trains in cities within the state, or the receipt or delivery of freight at points in the state, or the imposition of some liability for some other default occurring entirely within the state. If the statute applies, it directly affects a single shipment which is partly within and partly without the state. According to a ruling of

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the Supreme Court of the United States, such a shipment is interstate, and a regulation of it is beyond that legislative power of the state. In *Hanley v. Kansas City Southern Ry. Co.*, 187 U. S. 617, 23 Sup. Ct. 214, 47 L. Ed. 333, the transportation of goods on a through bill of lading from a point in Arkansas to another point in the same state over a road which passed a short distance through Indian Territory was held to be interstate commerce, subject to the regulation of Congress and free from interference by the state of Arkansas, which had undertaken to regulate the shipment. It was there said that: "The transportation of these goods certainly went outside of Arkansas, and we are of the opinion that in its aspect of commerce it was not confined within the state." It was in effect held that, when the subject of regulation is indivisible, there can be no division of regulation either as between states or as between the state and the nation; and that there can be no splitting of jurisdiction in proportion to the mileage in the state seeking to regulate interstate shipments. It was also said: "It is decided that navigation on the high seas between ports of the same state is subject to regulation by Congress (*Lord v. Steamship Co.*, 102 U. S. 541 [26 L. Ed. 224]), and is not subject to regulation by the state (*Pacific Coast Steamship Co. v. Railroad Commissioners* [C. C.] 9 Sawy. 253 [18 Fed. 10]), and, although, it is argued that these are not conclusive, the reason given by Mr. Justice Field for his decision in the last-cited case disposes equally of the case at bar. 'To bring the transportation within the control of the state, as part of its domestic commerce, the subject transported must be within the entire voyage under the exclusive jurisdiction of the state.' " The route of carriage was out of the state a very short distance, it is true; but, as we have seen, the shipment is to be treated as a unit, and the rule in such a case would appear to be the same whether the act of transportation was outside of the state one or a hundred miles. In *State v. Otis*, 60 Kan. 248, 56 Pac. 14, an act regulating the transportation of live stock, and which required the railroad company to carry the shipper free in certain cases, was under consideration. The shipment was originated in Luray, Kan., and ended a few yards from the state line in Kansas City, Mo., and it was held to be interstate commerce and the regulation a violation of the commerce clause of the federal Constitution. To the same effect is *Railway Co. v. Sinclair*, 77 Kan. 228, 94 Pac. 123.

Counsel for appellee contend that, as the transportation began and ended in the state, it was subject to state regulation, and rely on *Lehigh Valley Railroad v. Pennsylvania*, 145 U. S. 192, 12 Sup. Ct. 806, 36 L. Ed. 672, and some other cases based on that decision. The case, however, relates to taxation rather than transportation. In transporting property from place to place in Pennsylvania, the railway company passed for a short distance

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through New Jersey; but the tax which was the subject of controversy was determined upon the transportation within the state. It was held that a state might tax the business done in the course of a continuous carriage from one point to another in the state, although the railway company in accomplishing it incidentally traversed over a part of another state. In *Hanley v. Kansas City Southern Ry. Co.*, supra, Mr. Justice Holmes, who wrote the opinion, made it clear that the rule of the *Lehigh Valley Case* did not apply to a regulation of transportation. In speaking of the decisions of state courts which held that the *Lehigh Valley Case* was an authority for transportation which was partly outside of the state, he said: "These decisions were made simply out of deference to conclusions drawn from *Lehigh Valley Railroad v. Pennsylvania*, 145 U. S. 192 [12 Sup. Ct. 806, 36 L. Ed. 672], and we are of the opinion that they carry their conclusions too far. That was the case of a tax and was distinguished expressly from an attempt by the state directly to regulate the transportation while outside its borders. 145 U. S. 204 [12 Sup. Ct. 806, 36 L. Ed. 672]. And although it is intimated that, for the purposes before the court, to some extent commerce by transportation might have its character fixed by the relation between the two ends of the transit, the intimation was carefully confined to those purposes. Moreover, the tax was determined in respect of receipts for the proportion of the transportation within the state. 145 U. S. 201 [12 Sup. Ct. 806, 36 L. Ed. 672]. Such a proportioned tax had been sustained in the case of commerce admitted to be interstate. *Maine v. Grand Trunk Railway Co.*, 142 U. S. 217 [12 Sup. Ct. 121, 163, 35 L. Ed. 994]. Whereas, it is decided, as we have said, that when a rate is established it must be established as a whole." The distinction between the imposition of a tax and the regulation of transportation, as applied to a carrier doing interstate business, is commented upon in *Leavenworth v. Ewing*, 80 Kan. 58, 101 Pac. 664. It was there said: "The result of the authorities is that a rate on a continuous carriage from point to point within the state is to be regarded as a unit, and, when it is applied to a shipment which passes through more than one state, it takes on an interstate character and is beyond the regulation of the state; but a different rule obtains in the matter of taxation. The state may properly tax the property located within its borders of a corporation doing an interstate business, and may also tax that part of the business of such corporation which is done within the state." The language of the statute indicates a legislative purpose to limit its application to intrastate traffic. It refers to live stock received by carriers "for transportation within this state," and the time limit is applied to stock "transported by rail within this state." If, however, it were intended to apply to interstate commerce like the shipment in question,

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it would be necessarily invalid. In no event can there be a recovery under the statute for negligent delay in an interstate shipment.

It follows that the judgment must be reversed, and the cause remanded for further proceeding. All the Justices concurring.

FELT et ux. v. DENVER & R. G. R. Co.

(Supreme Court of Colorado, March 7, 1910. Rehearing Denied July 5, 1910.)

[110 Pac. Rep. 215.]

Appeal and Error—Exceptions—Direction of Verdict.—Where plaintiff excepted to the ruling granting defendant's motion to direct a verdict and the proper exception was preserved by the bill, an exception to the judgment was not necessary to warrant the appellate court in considering the evidence for the purpose of determining whether the ruling was correct.

Master and Servant—Injuries to Servant—Appliances—Railroads—Automatic Couplers.—In personal injury actions against railroads, where violation of the federal Safety Appliance Act (Act March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174]), requiring the use of automatic couplers on cars employed in interstate traffic is claimed, it is not necessary to allege or prove that a car was at the time actually loaded with interstate traffic.

Master and Servant—Injuries to Servant—Appliances—Railroads—Automatic Couplers.*—A car which had been actually engaged in moving interstate traffic, and which was held in the railroad yards to be sent on an interstate trip whenever required, and had not been segregated from the class of cars used in such traffic, was, though unloaded, being so used when a servant was injured, within the meaning of the federal Safety Appliance Act (Act March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174]), requiring such cars to be equipped with automatic couplers.

Master and Servant—Injuries to Servant—Appliances—Railroads—Automatic Couplers.—The mere fact that a railroad has frequently hauled interstate traffic is not sufficient in a personal injury action to hold the road amenable to the federal Safety Appliance Act (Act March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174]), requiring cars employed in interstate traffic to be equipped with automatic couplers.

*For the authorities in this series on the question whether or not cars were being used, on a particular occasion, in carrying on interstate commerce, see first foot-note of *Chicago, etc., Ry. Co. v. United States* (C. C. A.), 33 R. R. R. 83, 56 Am. & Eng. R. Cas., N. S., 83; second head-note of *Southern F. & G. Co. v. Northern Pac. Ry. Co.* (Ga.), 23 R. R. R. 529, 46 Am. & Eng. R. Cas., N. S., 529.

Felt et ux. v. Denver & R. G. R. Co

En Banc. Appeal from District Court, Pueblo County; John L. Voorhees, Judge.

Action by Eugene S. Felt and wife against the Denver & Rio Grande Railroad Company. Judgment for defendant, and plaintiffs appeal. Reversed and remanded.

Coulter & Garwood and *John A. Rush*, for appellants.

Devine & Dubbs and *Preston, Wolcott, Vaile & Waterman*, for appellee.

PER CURIAM. From the admissions in the pleadings and from the testimony, it appears that Charles R. Felt, aged about 25 years, the son of the plaintiffs, while attempting to couple cars in the pursuit of his employment as a brakeman of the defendant, received injuries causing his death in the month of February, 1902; that the defendant is a common carrier and was engaged, at the time of the injury, in the business of carrying interstate traffic for hire over its narrow gauge line extending from Colorado into the territory of New Mexico; that the cars between which Felt was caught and crushed were narrow gauge cars; that neither of the cars was equipped with automatic couplers, but both were equipped with link and pin couplers; that car No. 6918, one of the cars between which Felt was caught and crushed, came into the state from the territory of New Mexico loaded with lumber, billed for Florence; that the lumber had been unloaded, and that the car was being held under orders at Florence, awaiting a train to carry it to Salida, the distributing point for cars of that division, and at the time Felt was injured, he was attempting to couple this car into a train bound for Salida, where the car was to be held under general orders to be used whenever needed in the general traffic of the company over the narrow gauge line.

The complaint contains two causes of action. In the first, negligence in not complying with the federal Safety Appliance Act (Act March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174]) is charged; in the second, recovery is sought upon the liability of the defendant at common law. A general demurrer to the second cause of action having been sustained, the cause was tried upon the first cause of action.

At the close of the plaintiffs' case, the court directed a verdict in favor of the defendant, holding that neither of the cars of the defendant, between which the son of the plaintiffs was crushed was, at the time of the injury, under the control of Congress, and judgment of dismissal followed. The plaintiffs objected to the court directing a verdict, excepted to the ruling granting that motion, and excepted to the verdict directed. From the judgment the plaintiffs appealed to the Court of Appeals.

It was not necessary to except to the judgment. By excepting

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to the ruling on the motion to direct the verdict, the proper exception having been preserved by the bill, we may consider the evidence for the purpose of determining whether the motion should or should not have been granted. And we are of the opinion that the motion should not have been granted, and we must reverse the judgment for that reason.

The safety appliance act was the tardy response of Congress to the repeated requests of the President for action. Its purpose is to promote the safety of employees and travelers upon railroads, by compelling common carriers engaged in interstate commerce to equip their vehicles with certain safety appliances, and we shall assume that Congress intended, in the exercise of its power, to regulate commerce among the states, to exercise its broadest power in respect to the subject of this enactment. If, therefore, the cars, or either of them, between which the son of the plaintiffs was crushed, belonged, at the time of the injury, to a class of cars that was within the control of Congress, then the court wrongly directed the verdict. When the car started on its journey to Colorado, if not before, certainly then, the company violated the act of Congress in not equipping it with automatic couplers. The duty of thus equipping the cars having once rested upon the company, it devolved upon the company to show that something transpired to relieve it of that duty. It is said that the duty ceased when the car was unloaded at Florence; that at the time the car had ended its interstate journey and was under orders to be not returned to New Mexico, but to be sent to Salida. There is nothing in the order of the officers of the company which divested this car of the character of a car used in interstate commerce. The lumber being hauled had reached its destination, and when it was delivered to the consignee and mingled with the general property of the state, it ceased to be under the control of Congress; but the car itself had not reached its destination, its journey was not ended, the directions were to send it on to Salida, and not to return it to New Mexico.

In *Johnson v. Southern Pac.*, 196 U. S. 1, 25 Sup. Ct. 158, 49 L. Ed. 363, Mr. Chief Justice Fuller said: "Besides, whether cars are empty or loaded, the danger to employees is practically the same, and we agree with the observation of District Judge Shiras in *Voelker v. Chicago M. & St. P. R. Co.*, (C. C.) 116 Fed. 867, that 'it cannot be true that on the eastern trip the provisions of the act of Congress would be binding upon the company, because the cars were loaded, but would not be binding upon the return trip, because the cars are empty.'" Hence, it is not necessary, in actions of this character, to allege or prove that a car is actually loaded with interstate traffic. The law requires that it be equipped with automatic couplers at all times,

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until it reaches its destination, as fixed by the order of the company at the time it starts on its interstate journey.

This car was sent to Salida to be used in conveying interstate or intrastate traffic, as the demands of the company required. It was not set apart as a car to be used in intrastate traffic solely, but it was held at Salida ready to carry articles to points outside the state, if required, and was so intended to be used whenever needed. It was held in the case of *U. S. v. St. Louis, I. M. & S. R. Company* (D. C.) 154 Fed. 516, that such a car is being used in interstate commerce, within the meaning of the act of Congress. When the car was once used in interstate traffic it became impressed with the character of a car used in moving interstate traffic, and it so continued until the company took some action to change its character. The company owns an interstate highway. It is regularly engaged in moving traffic over this highway, and a car that has been used, and that stands ready for use upon this highway whenever required, may well be said to be a car regularly used in moving interstate traffic. The trains of the company, and all the vehicles thereof that travel this interstate highway on an interstate journey are required to be equipped with safety appliances, and this, whether hauling freight or empty, or whether engaged in hauling articles destined to points within or without the state. The car No. 6918, having been once used in actually moving interstate traffic, became impressed with that character and as it was held in the company's yards at Salida to be sent upon an interstate trip whenever required, and as the record does not show that the car was segregated from the class, i. e., cars used in moving interstate traffic, in which it was placed by the company, it was, at the time of the injury, a car used in moving interstate traffic, within the meaning of the act of Congress.

Counsel mainly rely upon the decision in the case of *Rio Grande Southern Railroad Company v. Campbell*, 44 Colo. 1, 96 Pac. 986, as supporting the ruling of the court in directing a verdict. The judgment in that case was reversed, because of the error of the court in receiving evidence prejudicial to the defendant.

The facts in that case are not at all like those in this, and that case should not control this. The testimony showed that the company was operating a railroad lying wholly within the state, and that it "frequently received from, and delivered to, connecting lines passengers and freight which had come from, or were destined to, points without the state." There was no showing that any car in the train was loaded with interstate traffic, or that the cars or any of them ever had been so engaged, and we hold now that the bare statement that a road has frequently hauled interstate traffic is not sufficient in a case of this character to hold

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the company amenable to the federal statute. In that case it was said: "Before he would be entitled to recover by virtue of the provisions of the act of Congress, * * * it was incumbent upon him to show that cars 1050 and 1925 were loaded with articles destined to some point outside the state." But upon reflection, in view of the strong additional light thrown upon the decision by the recent federal decisions, we are constrained to overrule the case in so far as it may be construed as holding that a car, unless actually loaded with articles, destined to some point outside the state is not under the control of Congress. We therefore hold that the car No. 6918, was, at the time of the injury mentioned in the complaint, under the control of Congress, and that the duty of equipping it with an automatic coupler devolved upon the defendant, because, at the time of the injury, the car had not concluded its interstate journey; its destination being Salida; also because at the time of the injury, the car was regularly engaged in moving interstate traffic, within the meaning of the act of Congress.

We find support for our judgment in the following cases: *Johnson v. Southern Pac. R. Co.*, 196 U. S. 1, 25 Sup. Ct. 158, 49 L. Ed. 363; *U. S. v. St. L., I. M. & S. R. Co.* (D. C.) 154 Fed. 516; *Belt Ry. Co. v. U. S.*, 168 Fed. 542, 93 C. C. A. 666, 22 L. R. A. (N. S.) 582; *Voelker v. C. M. & St. P. Ry. Co.* (C. C.) 116 Fed. 867; *U. S. v. Southern Ry. Co.* (D. C.) 164 Fed. 347; *Wabash R. Co. v. U. S.*, 168 Fed. 1, 93 C. C. A. 393.

The judgment is therefore reversed and remanded for a new trial, with leave to the parties to amend their pleadings as they may be advised.

Reversed and remanded.

CAMPBELL and GABBERT, JJ., dissent.

DULANEY & WHARTON v. PHILADELPHIA & R. RY. CO.

(Supreme Court of Pennsylvania, May 2, 1910.)

[77 Atl. Rep. 507.]

Carriers—Bill of Lading—Issue—Rights of Consignee.—Where connecting railroads, forming a through line, enter into an arrangement by which they employ an agent to solicit freight, and the agent issues a bill of lading before the initial carrier receives the goods, and with knowledge that the bill of lading is to accompany a draft on the consignee, and the consignee pays the draft, but the goods are never received either by the consignee or any of the railroads, the consignee can recover the amount of the draft from the terminal carrier, since, apart from the question of partnership, there is a joint liability on the part of all the companies on whose behalf the bill of lading was issued.

Carriers—Bill of Lading—Issue—Rights of Consignee.—In such a case it is immaterial whether the bill of lading was negotiable or not.

Appeal from Court of Common Pleas, Philadelphia County.

Action by Dulaney & Wharton against the Philadelphia & Reading Railway Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

Argued before BROWN, MESTREZAT, POTTER, ELKIN, and MOSCHZISKER, JJ.

Albert B. Weimer and *Theodore W. Reath*, for appellant.

William A. Carr, *W. Horace Hepburn*, and *Sidney L. Krauss*, for appellees.

MOSCHZISKER, J. The defendant company was a member of the Hoosac Tunnel Fast Freight Line, which was an association of a number of railroads for the purpose of securing and expeditiously handling freight within a certain territory. The line did not own or operate cars of its own; the freight being handled by and in the equipment of the roads over which it passed. The so-called association was little more than a name used to designate a mutual agreement or arrangement by which a number of connecting railroads formed a continuous freight line and employed common agents or managers at different points. All of the companies in the association contributed to the payment of the salaries of these common representatives according to an equitable system of apportionment estimated on the monthly receipts from the freight carried over the respective roads under bills of lading issued by such agents. The plaintiffs in the course of their business had been for some years in the habit of purchasing produce from one Frank E. Roberts, a commission

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broker in Chicago, Ill.; the goods purchased being shipped by him to them, and payments made through drafts issued by the former upon the latter, attached to bills of lading, and paid through banks in Philadelphia. On October 3, 1904, the plaintiffs received notice that a draft of this character had been presented at their bank. They accepted and paid the draft for \$2,200, and received a bill of lading issued by the Hoosac Tunnel Fast Freight Line acknowledging the receipt from Roberts of 400 cases of eggs, to be carried from Chicago to Philadelphia and delivered to the plaintiffs as consignees. The goods were not delivered, and the plaintiffs brought action against the freight line, assuming it to be a corporation. It being duly shown that the defendant named was not a corporation, the record was amended and all of the railroads composing the association were brought in as defendants; but service was only obtained upon the Philadelphia & Reading Railway Company, and the suit proceeded to trial against that defendant alone.

At the trial of the cause there was practically no contest as to the facts; those which we have enumerated were proved; and it was further shown that the bill of lading was in the usual form issued by the Hoosac Tunnel Fast Freight Line, and there was nothing on its face to indicate that the freight line was not a subsisting legal entity, or to show the railroads associated under that name. When the bill went out, the agent of the freight line had knowledge that it was to be used to accompany a draft upon the plaintiffs, and it issued before he secured possession of the eggs. Roberts gave the agent a written order for the car containing the eggs, which had not then arrived in Chicago, and, relying upon that order, the agent delivered the bill to Roberts. Later on he called upon the agent and told him that he had received information from the plaintiffs that had changed his mind about the shipping of the car to them; that he had already put the bill of lading with a draft attached, in bank, but that he would secure its return. He thereupon gave the agent an order consigning to another party the car which was to have gone to the plaintiffs. In order to protect the interests he represented, the agent secured from Roberts what he calls a bond of indemnity, and then attempted to divert the car from the plaintiffs to some one else; but the eggs were stopped in transit before this was accomplished, and they never came into the possession of the agent, the freight line, or any of its railroads. The agent took no precaution to notify the plaintiffs of the circumstances or that the draft should not be honored.

The plaintiffs claimed as damages the amount of the draft with interests from the date of its payment, and the jury rendered a verdict accordingly. The defendant has appealed, and contends that the Philadelphia & Reading Railway Company was

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not bound by the acts of the agent who issued the bill of lading; that it was not liable under the bill because the plaintiff failed to prove that it had received the goods; that it was not liable because the physical goods were never delivered to or came into the possession of any initial carrier of the freight line; that connecting carriers cannot be charged by proof that the goods did not reach their destination; that the plaintiffs caused their own loss by voluntarily and improperly paying a draft upon a straight bill of lading; and that the jury should have been instructed that no partnership had been made out between the members of the association.

After outlining the evidence showing the facts substantially as we have stated them, the trial judge said to the jury: "The facts as presented, not being denied, entitle the plaintiffs to a verdict for \$2,200, with interest from the date of the payment of the draft. That is to say, if you shall find the facts to be as they have been stated to you by the plaintiffs' testimony, that the * * * agent placed this bill of lading in the hands of Roberts, allowing him to use it as evidence of the fact that he had shipped over the railroad lines, through this agency, a car load of eggs, and Roberts then used the bill of lading for the purpose of collecting the amount represented by the draft, \$2,200—in that case, the agency of the various companies having been established, if their agents through carelessness or otherwise permitted Roberts to have the bill of lading without getting the eggs, it was no fault of the plaintiffs, and they should not be required to suffer or made to suffer by reason of that fact." Under the evidence, these were correct instructions on the law governing the case. The loss of the goods in transit was not averred or sought to be proved; and the amount claimed and the verdict rendered were for the sum which the plaintiffs paid on the draft, not the market value of the eggs. The negligence was in issuing the bill of lading and giving it to Roberts before the eggs were in the possession of the initial carrier of the freight line, when the agent knew that the bill was to accompany a draft on the plaintiffs which presumably would be paid by them in due course, and in the subsequent conduct of the agent whereby the defendant was so placed as to be unable to carry out its obligations under the bill. Whether the association of the various railroads named as defendants be viewed in the nature of a partnership so far as third parties are concerned, as expressed in *Block v. Fitchburg R. R. Co.*, 139 Mass. 308, 1 N. E. 348, or merely as an arrangement for the employment of common agents to conduct the business of each road carried on in the name of the freight line, at least all of the defendants that would have handled the freight under the bill of lading in question would be liable for the defaults of the agent who issued the bill (*Kansas City Southern Railway Co. v. Em-*

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bry, 76 Ark. 589, 90 S. W. 15, citing Hutchinson on Carriers); and it was shown that the Philadelphia & Reading Railway Company was in this class. The agent had authority from all of the roads to issue such bills, and there is evidence to show that he was within the scope of his apparent authority in letting the bill go out as he did. The very nature of the business described in the testimony, the expeditious handling of freight, must at times involve the giving of bills of lading upon the receipt of orders for merchandise en route, without any physical possession of the goods at the time the bill is issued. There was testimony to the effect that such was the custom, and there was no evidence that the agent acted contrary to instructions in so doing. In *Brooke v. New York, Lake Erie & Western Railroad Company*, 108 Pa. 529, 1 Atl. 206, 56 Am. Rep. 235, a shipping clerk at one of the stations of the defendant railroad issued a bill of lading in its name for goods that the company had never received, and the bill came into the hands of an innocent third person for value. On the suit of such person, it was held that the defendant was estopped by the act of its agent from denying the receipt of the goods, although the clerk had no authority to give bills without receiving the goods and the company had never done anything to lead any one to suppose that he had such authority. The governing principles of that case are applicable in the present one, and we are not convinced that the law of the state of Illinois differs from the rules therein enunciated and applied. The case relied upon by the defendant (*Lake Shore & Michigan Southern Railway Co. v. National Live Stock Bank*, 178 Ill. 506, 53 N. E. 326) was on a set of facts quite different from those of the present case. There, when the parties who were endeavoring to recover obtained the receipt from the defendant company, they knew as a matter of fact that the company had not received the articles mentioned therein; and the court properly held that the receipt could be contradicted and the true state of facts shown, and that thereunder no recovery could be had. The interests of innocent third parties were not involved, which is the distinction between that case and this one. A careful reading of the case will show no ruling that a recovery is barred where the goods covered by a bill of lading are not received by the carrier. It goes no further than to rule that a recovery "may be defeated" under such circumstances.

The conflict of decisions regarding the liability of a carrier for the fraudulent act of an agent in issuing a bill of lading for goods which he had not received and had no intention of receiving need not be discussed, as these decisions have no application to the facts in this case. Not only did the present agent expect to get or control the possession of the eggs when he issued the

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bill, but, as previously noted, there was some evidence to show that it was customary for him to issue bills before actually securing possession of the goods, and it is perfectly apparent from the testimony that he acted in good faith toward his principals; in fact, it appears that he took some sort of indemnity for their protection.

The contention that the plaintiffs caused their own loss by voluntarily and improperly paying a draft accompanying a straight bill of lading cannot be sustained. The negotiability or nonnegotiability of the bill is not in question. Even though one would have been protected by the delivery of the goods without getting possession of the bill, the carrier had the right to demand it before making the delivery, and the plaintiffs were justified in presuming that such a demand would be made. They only did the natural and proper thing in accordance with the usual course when they paid the draft and took up the bill.

On the last contention of the defense, it is sufficient to say that the plaintiffs did not rest their case upon the theory of partnership. The defendant company was in an association of some sort or character, and it was not necessary to inquire into the exact legal relation of the different members inter se. Without regard to the question of partnership, so far as the plaintiffs were concerned, there was a joint liability on the part of all of the roads on whose behalf the bill of lading was issued. The acts of the agent bound all of the principals thus involved, and a recovery could be had against the one upon which service was secured.

We see no merit in any of the assignments of error. They are all overruled, and the judgment is affirmed.

POPE *et al.* v. WISCONSIN CENT. RY. CO.

(Supreme Court of Minnesota, Aug. 5, 1910.)

[127 N. W. Rep. 436.]

Carriers—Contract to Furnish Cars—Validity—Consideration.—

Action to recover damages for breach of an alleged contract whereby the defendant agreed to furnish cars at a specified time for the shipment of the plaintiffs' sheep over its line. Verdict for plaintiffs. Held, that such a contract need not be in writing. A request by the plaintiffs that the defendant furnish the cars for the shipment of the sheep over its line carried with it by implication an understanding on their part so to use the cars if the request be complied with, and furnishes a sufficient consideration for the defendant's promise to furnish the cars.

Carriers—Contract to Furnish Cars—Question for Jury.—The question whether the parties made the alleged contract was, under the evidence, a question of fact. Hence the court did not err in denying the defendant's motion for an instructed verdict, nor in denying its motion for judgment notwithstanding the verdict.

Appeal and Error—Assignments of Error—Sufficiency.—An assignment of error that the court erred in admitting testimony over the objection of appellant, and in excluding testimony offered by it, and one that the court erred in its charge to the jury, are too general to be of any avail. An assignment that the court erred in denying appellant's motion for a directed verdict is good.

(Syllabus by the Court.)

Appeal from District Court, Hennepin County; Wilbur F. Booth, Judge.

Action by G. B. Pope and others against the Wisconsin Central Railway Company. Verdict for plaintiff. From an order denying a motion for judgment non obstante veredicto or a new trial, defendant appeals. Affirmed.

John L. Erdall and *L. K. Eaton* (*A. H. Bright*, of counsel), for appellant.

Stiles, Devaney & Hewitt, for respondents.

START, C. J. The plaintiffs brought this action in the district court of the county of Hennepin to recover damages sustained by them on account of the breach of an alleged contract of the parties whereby the defendant agreed to furnish cars for the transportation of 2,750 sheep from the Twin City Stockyards to Chicago. The complaint alleged, in effect, that on September 18, 1907, the plaintiffs were in possession of 3,679 fat sheep at the stockyards, and requested the defendant to furnish a suitable number of stock cars to ship the sheep the next day

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over the railway line of the defendant; that the defendant agreed so to do, but negligently failed to furnish any cars, except four, in which 929 of the sheep were shipped, leaving 2,750 thereof at the stockyard; that the plaintiffs were unable to ship the sheep until four days thereafter, when the plaintiffs succeeded in getting the cars for such shipment from another carrier; and, further, that in the meantime the sheep fell off in weight, and their market value materially declined, to the plaintiffs' damage in the sum of \$1,675, which would not have been sustained, except for the defendant's breach of the contract. The answer put in issue these allegations of the complaint, and specifically denied the making of the alleged contract.

On the trial the plaintiffs based their right to recover upon the alleged express contract. This issue was the pivotal question, and the trial court instructed the jury that, unless they found from the evidence that the defendant made the contract, they must return a verdict for the defendant. The jury returned a verdict for the plaintiffs in the sum of \$1,550, and thereby, under the charge of the court, necessarily found that the defendant made the alleged contract. The defendant appealed from an order of the trial court denying its motion for judgment or a new trial, and assigns the following errors: "(1) The court erred in denying appellant's motion to dismiss at the conclusion of plaintiff's case. (2) The court erred in denying the appellant's motion for a direct verdict at the close of all the testimony. (3) The court erred in admitting testimony over appellant's objection, and in excluding testimony offered by the defendant. (4) The court erred in its charge to the jury. (5) The court erred in denying appellant's motion for judgment notwithstanding the verdict or for a new trial."

The plaintiffs make the point that the assignments of error are not sufficient to raise any question for the consideration of this court. This is true of assignments 3 and 4, for neither indicates the specific error intended to be asserted. There were several rulings on the admission of evidence, and several separate and distinct propositions in the charge of the court; hence we do not consider any alleged errors as to the admission or rejection of evidence, or in the charge of the court. *Carpenter v. Railway Co.*, 67 Minn. 188, 69 N. W. 720.

Assignment 2 is sufficient to raise the question whether the trial court erred in denying defendant's motion for a directed verdict in its favor. A motion for an instructed verdict is simply a request for a particular instruction. A review of a ruling granting or refusing an instructed verdict ordinarily involves a consideration of the pleadings and evidence. An assignment that the court erred in denying the motion for a directed verdict, or one that the court erred in granting a motion to dismiss the action, or one granting a motion for a new trial, is suf-

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ficient, for from the very nature of such alleged errors it is impracticable to be more specific. *American Express Co. v. Piatt*, 51 Minn. 568, 53 N. W. 877; *Ermentrout v. Insurance Co.*, 60 Minn. 418, 62 N. W. 543; *Wilcox v. Insurance Co.*, 81 Minn. 487; 84 N. W. 334; *Ecker v. Isaacs*, 98 Minn. 146, 107 N. W. 1053. The only question, then, for our decision, is whether the trial court erred in refusing the defendant's motion for a directed verdict. If it did, then judgment notwithstanding the verdict would follow, unless the case comes within the rule of *Cruikshank v. Insurance Co.*, 75 Minn. 266, 77 N. W. 958.

The defendant claims that there was no evidence of the alleged contract to furnish the cars, nor of duty to furnish them. It is immaterial as to the defendant's common-law duty in the premises; for if there was no evidence tending to support a finding by the jury that the express contract was made substantially as alleged, the court erred in refusing defendant's motion for an instructed verdict. There was evidence tending to show that the agent of the plaintiffs in charge of the sheep, McManners, went to the local agent of the Twin City Yards, Espenatt, for the purpose of making arrangements for the transportation of the sheep over the defendant's line to Chicago; that the plaintiff's agent and the local agent, purporting to act for and on behalf of the defendant, entered into the alleged contract whereby the sheep were to be shipped to Chicago over the defendant's line, and that sufficient cars for that purpose were to be furnished on the night of September 19th; that the defendant furnished four cars for such purpose; and, that Espenatt had authority to make such contract on behalf of the defendant, although there was no evidence of express authority, nor was the contract in writing. The evidence in some material particulars is conflicting; but the credibility of the witnesses and the weight to be given to their testimony were questions for the jury.

The defendant further claims that the contract relied upon by the plaintiffs as the basis of this action, being an oral one, is within the purview of Laws 1907, c. 23 (Rev. Laws Supp. 1909, §§ 2023—1 to 2023—13), known as the "Reciprocal Demurrage Law," and is therefore void, because the request for the cars was not in writing. The act referred to has no application to voluntary contracts between carriers and shippers, for its purpose is to provide the methods whereby the shipper may secure from a railway carrier cars for the transportation of his freight within the time limited by the act, or subject it to the penalties there provided. Where the shipper seeks to avail himself of the remedies provided by the act, he must make his demand for cars in writing. The plaintiffs in this case did not proceed under the act; hence it is not relevant to this case.

The defendant also urges that the contract is within the statute of frauds (Rev. Laws 1905, § 3484), which provides that every

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contract for the sale of any goods, chattels, or things in action, for the price of \$50 or more, shall be void, unless a note or memorandum thereof is made and signed by the party to be charged therewith. The claim is without merit. The subject-matter of the contract was not goods, nor chattels, nor things in action, nor for the sale of anything.

The further claim is made that the contract was lacking in mutuality and was without consideration, for the reason that there was no promise by the plaintiffs' agent to ship the sheep over the defendant's line, or to pay for their transportation. There was no evidence of an express promise to this effect, but there was evidence to the effect that the plaintiffs' agent went to the office of the local agent, and said to him: "I have 20 cars of sheep to go over the Wisconsin Central to Chicago. When can you furnish the cars?" That the local agent inquired: "When do you want to go out?" That the answer was: "I want to go out to-night." And the local agent replied: "All right." The sheep were then in the stockyards ready to be shipped as soon as the cars were furnished. While there was no express promise to ship the sheep, in the cars to be furnished, over defendant's line, yet the request for the cars for the purpose of so shipping the sheep carried with it by implication a promise so to use the cars and pay the freight if the request was complied with. *Clark v. Railway Co.*, 189 N. Y. 93, 81 N. E. 766, 13 L. R. A. (N. S.) 164, 121 Am. St. Rep. 848. The reason for this conclusion is well stated in the case cited, in these words: "The request that the car be furnished carried with it, by implication of law, an agreement to make use of it if the request was complied with, and a correlative promise to pay to the defendant in the event of nonuser whatever loss it might thereby incur. This obligation is just as clear as would be that of a person who went into a restaurant and ordered a dinner for a party of friends to pay for the meal furnished in accordance with his order, even though he produced no guests to partake of his hospitality."

We hold that there was a sufficient consideration for the contract to furnish the cars, and that it was not void because not in writing, and, further, that whether the parties entered into the contract was, under the evidence, one of fact and not of law. Therefore the court did not err in denying the defendant's motion for an instructed verdict in its favor.

Order affirmed.

ROANOKE RY. & ELECTRIC CO. *v.* STERRETT.

(Supreme Court of Appeals of Virginia, Sept. 15, 1910.)

[68 S. E. Rep. 998.]

Appeal and Error—Review—Verdict—Conclusiveness.—A verdict on conflicting evidence is conclusive on appeal.

Damages—Personal Injuries—Instructions.—An instruction that if one, suing for personal injuries, refused to submit to physicians' treatment or to follow their instructions, she could not recover so far as her injuries were aggravated by such refusal, was properly modified to require a finding that the refusal was unreasonable where the physicians were defendant's surgeons.

Carriers—Injuries to Passengers—Negligence—Burden of Proof.*—The burden rested primarily on a street car passenger, suing for injuries caused by a bridge collapsing under the car, to show the company's negligence, but proof of injury through the accident was sufficient.

Carriers—Injury to Passengers—Negligence—Burden of Proof.*—In a suit by a passenger against a carrier for personal injuries, proof of the accident shows negligence *prima facie*, and requires the carrier to disprove negligence, and show that the accident was inevitable, or resulted from a cause against which human care and foresight could not provide.

Carriers—Injuries to Passengers—Instructions—Negligence.†—In an action for injury to a street car passenger caused by a bridge collapsing under the car, it was not error to instruct that if the proximate cause of the collapse "might have been" the slipping of stringers, and that the defendant was negligent in the method adopted in placing the stringers in the bridge, plaintiff could recover.

Error to Circuit Court, Roanoke County.

Action by Mary E. Sterrett against the Roanoke Railway & Electric Company. From a judgment for plaintiff, defendant brings error. Affirmed.

WHITTLE, J. This case is before us the second time. See *Roanoke Ry. & E. Co. v. Sterrett*, 108 Va. 533, 62 S. E. 385, 19 L. R. A. (N. S.) 316, 128 Am. St. Rep. 971.

At the last trial the plaintiff, Mary E. Sterrett, was awarded

*For the authorities in this series on the subject of the presumption of negligence arising from the fact that a train or street car was derailed, see last foot-note of *St. Louis, etc., R. Co. v. Savage* (Ala.), 34 R. R. R. 442, 57 Am. & Eng. R. Cas., N. S., 442; foot-note of *Sloan v. Little Ry. & Elec. Co.* (Ark.), 34 R. R. R. 183, 57 Am. & Eng. R. Cas., N. S., 183.

†For the authorities in this series on the subject of the rebuttal of the presumption of negligence arising from the fact that a passenger is injured, see last foot-note of *Sewell v. Detroit United Ry.* (Mich.), 34 R. R. R. 453, 57 Am. & Eng. R. Cas., N. S., 453.

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\$5,700 damages for injuries sustained by her while a passenger on a motor car of the defendant caused by the falling in of its bridge over Tinker creek between Vinton and Roanoke. On the morning of the accident Mrs. Sterrett boarded the car in question near Vinton for Roanoke. The car continued to take on passengers until it reached the bridge, and entered upon it in an overcrowded condition, moving slowly, and, when upon the extreme western section, the structure suddenly collapsed, and in the fall the plaintiff, who was standing in the aisle about midway of the car, received the injuries for which she sues.

On the last as upon the first trial, two wholly distinct theories were presented as to the cause of the accident. On behalf of the plaintiff it was insisted that the original plan of the bridge called for stringers with sufficient lap, resting upon eye-beams, and securely fastened together so as to prevent the possibility of slipping; that some eight or ten months prior to the accident the stringers originally used in the bridge by the Virginia Bridge & Iron Company, who constructed it, were removed and replaced by new stringers laid end to end and unfastened; and that the slipping of some of these stringers from their supports caused the bridge to collapse. On the other hand, the theory of the defendant is that there was a defective weld in one of the iron cords, upon which the bridge was dependent for support; that the cord broke at the weak point and the bridge fell; and that the defect was latent, and could not be discovered by inspection.

On the first appeal the evidence was found entirely insufficient to sustain the plaintiff's theory. Indeed, the plaintiff introduced no expert evidence on the subject, and the opinion witnesses for the defendant testified that the conditions described by the non-expert witnesses, even if true, could not possibly have caused or contributed to the accident. They explained the mechanism of the bridge—that it was built in sections, united by iron cords, which bound them in one span and held up the structure, and that it fell by reason of the latent defect in the weld of one of the eye-bars forming the bottom cord, as before described. The judgment was consequently reversed by this court and a new trial awarded.

It would serve no good purpose to discuss in detail the evidence as disclosed by the present record. It is enough to say that it is to the last degree conflicting. The expert testimony of the plaintiff controverts utterly the defendant's theory, and sustains the opposing hypothesis, that the accident resulted from the slipping of the substituted stringers from the eye-beams caused by the negligent manner in which they were placed and maintained in the bridge. Upon familiar principles, therefore, the verdict of the jury is conclusive upon that phase of the case.

The assignments of error touching instructions involve the

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amendment of instructions "C" and "D" as offered by the defendant.

Instruction "C," as amended, told the jury "that if they believe from the evidence that the plaintiff unreasonably refused to submit to the treatment of physicians, or unreasonably refused to follow their instructions in regard to her injuries, and that in consequence of her refusal so to do her injury was aggravated and increased, then she cannot recover * * * to the extent her conduct resulted in damage to her, and which might have been avoided and prevented by submitting to the treatment and following the directions of her physicians."

The objection goes to the interpolation of the word "unreasonably" in the instruction. The physicians alluded to were the surgeons of the defendant employed by the company to attend the plaintiff. She had also engaged physicians of her own selection, and by the instruction as originally offered was held bound at the risk of curtailing her recovery of damages to submit to the treatment prescribed by the defendant's surgeons whether reasonable or unreasonable. The amended instruction correctly told the jury that the plaintiff's right of recovery could only be affected by her unreasonably refusing to submit to the treatment or follow the instructions of physicians.

The concluding paragraph of instruction "D," as amended, is as follows, the italicized words indicating the amendment to which exception was taken: "Now, if the jury believe from the evidence that the proximate cause of the collapse of the bridge *might have been* the slipping of one or more of the stringers from the eye-beams, and that the defendant was negligent in the method it adopted in placing and maintaining said stringers in the bridge, they must find for the plaintiff; and, if they believe from the evidence that the proximate and sole cause of the collapse of the bridge was the breaking of said loop-bar, owing to a hidden or latent defect therein, they must find for the defendant."

It is true the burden rested upon the plaintiff primarily to establish the negligence of the defendant, but, as was said on the former appeal, "where the plaintiff has shown that she was injured by the breaking down of the bridge and overturning of the car, then this is sufficient proof of negligence on the part of the defendant company to meet the requirements above stated."

In an action by a passenger against a common carrier for personal injuries, proof of the accident raises a prima facie presumption of negligence, and shifts upon the defendant the burden of proving that it has not been guilty of negligence, and that the accident resulted from inevitable casualty, or some cause against which human care and foresight could not provide. Accordingly, this court, on the first appeal, approved the following instruction: "The slightest neglect against which human prudence

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and foresight might have guarded, and by reason of which the injury may have been occasioned, renders the Roanoke Railway Company liable in damages for such injury. *B. & O. R. Co. v. Wightman's Adm'r*, 29 Grat. 431, 26 Am. Rep. 384; *B. & O. R. Co. v. Noell's Adm'r*, 32 Grat. 394."

The amendment objected to is in the language of the foregoing instruction, which correctly measures the high degree of responsibility owing from a common carrier to a passenger and is conclusive on the point at issue.

Upon the whole case we find no error in the judgment, and it must be affirmed.

Affirmed.

PATE v. COLUMBIA & P. S. R. Co.

(Supreme Court of Washington, March 13, 1909.)

[100 Pac. Rep. 324.]

Carriers—Carriage of Passengers—Injuries—Presumptions and Burden of Proof.*—In an action for injuries received by a passenger, caused by the breaking of an axle under the tender, and the partial derailling of the coach in which plaintiff was riding, it will be presumed that the accident was caused by the negligence of the carrier, and the burden of proof is on the carrier to rebut such presumption.

Carriers—Carriage of Passengers—Injuries—Questions for Jury.—Where the testimony of plaintiff, in an action to recover for injuries received while riding on defendant's train, caused by the breaking of an axle under the tender, shows that the train was operated at a high rate of speed, and that the roadbed was insufficient, and the testimony of defendant shows that its roadbed was in good condition and its cars and equipment properly inspected, and its train carefully operated, the question whether defendant was exercising a proper degree of care is for the jury.

Damages—Personal Injuries—Excessiveness.—Evidence of damages in an action by a passenger for injury considered, and held insufficient to sustain a verdict for more than \$1,000.

*For the authorities in this series on the subject of the presumption of negligence arising from the fact that a passenger was injured by reason of the derailment of the car or train upon which he was riding, see fifth foot-note of *Hoskins v. Northern Pac. Ry. Co.* (Mont.), 34 R. R. R. 174, 57 Am. & Eng. R. Cas., N. S., 174, where all those preceding it are collected; *Sloan v. Little Ry. & Elec. Co.* (Ark.), 34 R. R. R. 183, 57 Am. & Eng. R. Cas., N. S., 183; second foot-note of *St. Louis, etc., R. Co. v. Savage* (Ala.), 34 R. R. R. 442, 57 Am. & Eng. R. Cas., N. S., 442.

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Appeal from Superior Court, King County; Boyd J. Tallman, Judge.

Action by Merrell Pate against the Columbia & Puget Sound Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed, unless plaintiff elects to remit part of the amount for which judgment was rendered.

Farrell, Kane & Stratton and *Peter L. Pratt*, for appellant.
John E. Humphries and *Geo. B. Cole*, for respondent.

RUDKIN, C. J. This action was instituted to recover damages for personal injuries sustained by the plaintiff while a passenger on one of the defendant's trains. Shortly after the train in question left Maple Valley on its return trip to the city of Seattle on the 7th day of July, 1907, one of the axles under the tender broke, and the coach next to the tender in which the plaintiff was riding left the track. The front end of the coach went down over the embankment forming the roadbed, while the rear end remained attached to the next coach, which did not leave the track. After leaving the track, the coach stood upright at an angle of about 45 degrees. The seats in the coach were nearly all torn loose, and the passengers were thrown or slid down to the front end of the car. According to the testimony of the plaintiff, the coach was the common one in ordinary use, about 50 feet in length, but other testimony tended to show that the coach was a combination passenger and baggage car; the portion set aside for passengers being about 25 feet in length. The nature and extent of the injuries suffered by the plaintiff will be considered in connection with the claim that excessive damages were allowed under the influence of passion and prejudice. The jury rendered a verdict in favor of the plaintiff in the sum of \$4,000, and, from a judgment on this verdict, the present appeal is prosecuted.

The only assignments of error we deem it necessary to consider or discuss are, first, that the court erred in denying a motion for judgment notwithstanding the verdict, because there was no evidence of negligence on the part of the appellant; and, second, that the court erred in denying a motion for a new trial because excessive damages were allowed. The law presumes that accidents such as the one complained of are attributed to the negligence of the carrier, and the burden of the proof is on the carrier to rebut this presumption. And, while the testimony on the part of the appellant tended to show that its roadbed was in good condition, its cars and equipment properly inspected, and its train carefully operated, there was other testimony tending to show that the train was operated at a high rate of speed, and that the roadbed was rough and uneven. It cannot be said, therefore, as a matter of law, that the appellant exercised that high degree

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of care which the law exacts of those engaged in carrying passengers by the dangerous agency of steam. There was no error in denying the first motion interposed.

The actual physical injuries suffered by the respondent were slight, and for a considerable time after the accident he himself considered them so. They consisted of a grazed shin, a bruise on the knee, and a bruise on the hip. He was never in a hospital or confined to his bed, and no serious consequences have developed from these particular injuries. He claims, however, that about three weeks after the accident he was taken with a pain in his side; that this pain seizes him whenever he attempts to raise his arm above his shoulder; and that by reason thereof he is unable to follow his customary calling, that of painter and decorator. Five surgeons in all testified at the trial, two for the respondent and three for the appellant; but their testimony was substantially the same. They all agreed that there were no objective symptoms, and that they were compelled to rely entirely upon the statements of the respondent as to the existence, nature, and extent of the pains and injuries from which he was suffering. If the pains exist as claimed, their cause is problematic. Dr. Carroll for the respondent, who performed an operation on him some three years before, testified that the pains might result from the previous operation, from a cold or from other causes, and would go no farther than to say that the pains might also result from a fall. No witness was questioned or testified as to the probable duration of the pains or disability, if they in fact existed, and there was no testimony that would warrant the jury in finding that the injuries were permanent. Under these circumstances, we have no hesitation in saying that the verdict returned by the jury is grossly excessive. If the injuries suffered by the respondent are more serious and more lasting than the record before us would indicate, the respondent is under no obligation to submit to the reduction which this court is compelled to make, but may call for a new trial. It seems to us that any verdict in excess of \$1,000 would be excessive in this case, and a new trial is ordered unless the amount of the recovery is limited to that sum.

The judgment of the court below is therefore reversed, and, if the respondent elects to accept \$1,000 and costs in the court below within 10 days after the remittitur is filed there, a new judgment will be entered for that amount, otherwise a new trial is granted. The appellant will recover its costs in this court.

CROW, DUNBAR, MOUNT, FULLERTON, GOSE, and CHADWICK, JJ., concur.

LEVIN *et ux.* v. PHILADELPHIA & R. R. Co.

(Supreme Court of Pennsylvania, May 16, 1910.)

[77 Atl. Rep. 456.]

Carriers—Injury to Passenger—Action—Presumption.*—In an action for injuries to a passenger, there is no presumption of negligence of the defendant where nothing happened to the car on which plaintiff was riding, and there is no collision nor breakage of anything.

Carriers—Injury to Passenger—Action from Injury—Question for Jury.—In an action for injury to a passenger, evidence held insufficient to go to the jury on the issue of defendant's negligence.

Appeal from Court of Common Pleas, Philadelphia County.

Action by Abraham Levin and wife against the Philadelphia & Reading Railroad Company. From a judgment for defendant, plaintiff's appeal. Affirmed.

At the trial it appeared that the plaintiff was injured on March 9, 1907, at Woodmont station on defendant's railroad. The plaintiff testified that she was seated in the third seat from the door when the conductor "called Woodmont station, and me sitting in the same place, and I was sitting on the same place when the train stopped and the conductor called Woodmont station, and my husband arose to go out and I tried to put one foot—one foot, and one train struck the other train and I fell." The plaintiff's husband described the accident as follows: A. I went to Ninth and Spring Garden to go to Woodmont station with my brother, on a farm. When it came to Woodmont station, the conductor called out, 'Woodmont station here,' and the train stops. I have a graphophone in my hand, and I took the graphophone and I called my wife, 'Come down. Here is Woodmont station,' and I stand up and wants to go and the train starts to go and stops again, and pulls one car another car. Q. What? A. One car pulls another car when she stops again, and I fall to the chair, and when I looked in the back side for my wife—she was three chairs in

*For the authorities in this series on the question whether a presumption of negligence arises from the fact that a passenger is injured, see second foot-note of *Williford v. Southern Ry. Co.* (S. Car.), 35 R. R. R. 693, 58 Am. & Eng. R. Cas., N. S., 693; second foot-note of *Sewell v. Detroit United Ry.* (Mich.), 34 R. R. R. 453, 57 Am. & Eng. R. Cas., N. S., 453; second foot-note of *Christensen v. Oregon Short Line R. Co.* (Utah), 34 R. R. R. 253, 57 Am. & Eng. R. Cas., N. S., 253.

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the back, I see she was on the floor in the back side and crying. I go to the conductor and we put her off and take her outside."

Argued before BROWN, MESTREZAT, POTTER, ELKIN, and MOSCHZISKER, JJ.

Harry G. Sundheim, for appellants.

Wm. Clarke Mason, for appellee.

PER CURIAM. Nothing happened to the car on which the plaintiffs were riding. There was no injury to it, no collision nor breakage of anything. There was therefore no presumption of negligence. *Herstine v. Lehigh Valley Railroad Co.*, 151 Pa. 244, 25 Atl. 104; *Cline v. Pittsburg Railways Co.*, 226 Pa. 586, 75 Atl. 850. Whether the negligence set out in plaintiffs' statement as the cause of the injuries sustained by Esther Levin was proven, or whether the same were due to a jolt of the car incident to the stopping of the train at the station, would under the testimony of the injured plaintiff and her husband have been a mere guess by the jury. She said that, when the conductor announced the station and she tried to put her foot out, "one train struck the other train and I fell." His testimony was that in one second one car pulled another.

As the jury could not intelligently have found from the case as presented by the plaintiffs that the defendant was negligent, the judgment on the verdict directed in its favor is affirmed.

KNUCKEY v. BUTTE ELECTRIC RY. Co. *et al.*

(Supreme Court of Montana, May 28, 1910.)

[109 Pac. Rep. 979.]

Master and Servant—Joint Liability.—Rev. Codes, § 6486, provides that, when the death of one person is caused by the wrongful act or neglect of another, his representatives may maintain an action against the person causing the death, or, if such person be employed by another who is responsible for his conduct, then also against such other person. Held, that a passenger might sue jointly the carrier and the carrier's servant whose negligence caused plaintiff's injuries.

Carriers—Injuries to Passenger—Pleading.—In an action against a carrier for injuries to a passenger, the complaint alleged that, while plaintiff was getting off the car, it was started and put in motion, whereby he was injured. Held, that the language implied that the car had stopped and was started while plaintiff was alighting.

Carriers—Injuries to Passenger—Pleading.*—A complaint alleged that plaintiff's destination was at a certain street, and that while he was at his destination and in the act of getting off the car it was started without allowing him sufficient time to get off, whereby he was injured. Held, that the complaint stated a cause of action.

Words and Phrases—"Start."—"Start" means to cause to move; to set going; to give an initial impulse, as to start a train; to cause to begin to move; the beginning, as of a journey or course of action; initial impulse or movement; first motion from a place.

Carriers—Injuries to Passenger—Pleading.—Rev. Codes, § 6587, provides that where the allegation is unproved, not in some particular or particulars only, but in its general scope and meaning, it is not a variance, but a failure of proof. The complaint alleged plaintiff's destination as a certain street, and that while he was at his destination and in the act of getting off defendant's car it was negligently started and put in motion with a violent start, whereby he was injured. The evidence showed that the speed of the car was slackened at such point, but that it ran by there when the speed was accelerated, whereby plaintiff was thrown from the car and injured. Held, that there was a failure of proof.

Carriers—Injuries to Passenger.†—Where a passenger arose from his seat as the car approached his destination, went out on the platform, and mentioned the name of the street to the motorman, which

*For the authorities in this series on the subject of negligence in starting a street car while a passenger is attempting to board car, find a seat, or alight, see first foot-note of *Ryan v. Pittsfield Elec. St. Ry. Co.* (Mass.), 35 R. R. R. 446, 58 Am. & Eng. R. Cas., N. S., 446.

†See foot-note of preceding case.

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was the customary manner of signifying a desire that the car be stopped, and the speed of the car was reduced to about four or five miles an hour, and, under the impression that it was about to stop, he stepped from the platform to the first step of the car, and the car continued at a slow rate of speed for some distance beyond the crossing, when suddenly the speed was increased with a violent jerk, and the passenger was thrown off and injured, it established a prima facie case of negligence.

Carriers—Injuries to Passenger.†—The mere fact that a passenger is injured while alighting from a car is not sufficient to charge the carrier with liability.

Appeal from District Court, Silver Bow County; John B. McClernan, Judge.

Action by Frank Knuckey against the Butte Electric Railway Company and another. From a judgment in favor of plaintiff, defendants appeal. Reversed.

Charles J. Walker, W. M. Bickford, George F. Shelton, and Charles A. Ruggles, for appellants.

J. O. Davies and Maury & Templeman, for respondent.

SMITH, J. This is an action to recover damages on account of personal injuries, alleged to have been sustained by plaintiff while a passenger on one of the street cars of the defendant Butte Electric Railway Company, in Butte, Silver Bow county. The complaint, after alleging that the destination of the plaintiff, on the night he was injured, was the intersection of Warren and East Galena streets, alleges: "That while plaintiff was such passenger, and at his destination, the place aforesaid, when in the act of getting out of and off from said car and being still thereon, to wit, on the platform and steps thereof, the said car was, through want of care of the said defendants, carelessly and negligently started and put in motion, with a sudden and violent start and without allowing plaintiff sufficient time to get off, and in consequence thereof, and in consequence of the negligence and carelessness of the defendants in running and conducting said car, the said plaintiff was suddenly and violently thrown to the ground," etc.

The plaintiff testified, in substance: That as the car approached the intersection of Warren and East Galena streets, he arose from his seat near the front door and went to the door, which he found was fastened on the outside. The motorman unfastened it and let him out upon the platform. As he passed out, he said "Warren," in an ordinary tone of voice. The car slowed down near the crossing, to a speed of about four or five miles per hour. Plaintiff stepped down one step, with his hand

†See (†) on preceding page.

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grasping the iron rail. The car did not stop at Warren street, but continued to run at the slow rate of speed for about 100 feet, when suddenly it was violently jerked and started forward so swiftly that plaintiff lost his hold, fell to the ground and was injured. Other passengers testified that there was a violent jerk of the car.

At the close of plaintiff's case, the defendant Rundblad filed a motion to dismiss the action as to him, for the reason, among others, that there was a fatal variance between the proof introduced by plaintiff and the allegations of his complaint. The defendant Butte Electric Railway Company moved for a nonsuit for the same reasons. Both motions were overruled. At the close of all of the testimony, defendants moved the court to peremptorily instruct the jury to return a verdict in their favor, for the same reasons urged in support of the previous motions. This the court refused to do. The trial resulted in a verdict for the plaintiff in the sum of \$25,000. This amount was reduced to \$11,000 by the trial court as the condition of an order denying a new trial. Plaintiff accepted the condition. From the judgment and the latter order, defendants have appealed.

1. It is contended by counsel for the appellants that there is a misjoinder of parties defendant, for the reason that there is no joint liability of the master and the servant; that the liability of the master rests upon an entirely different basis from that of the servant, in that the liability of the latter is based directly upon his own negligent act and its effect upon the plaintiff, whereas the liability of the master results from the application of the doctrine of respondeat superior. The question is hardly an open one in this state. We have the modern reformed procedure, and it has been customary to pursue the practice adopted by the plaintiff. In *Golden v. Northern Pacific Ry. Co.*, 39 Mont. 435, 104 Pac. 549, the matter was practically decided adversely to the appellants' contention. Now that the point has been directly raised, we see no reason for changing our views. The Supreme Court of Washington has held to the same effect in *Howe v. Northern Pacific Ry. Co.*, 30 Wash. 569, 70 Pac. 1100, 60 L. R. A. 949, as has likewise the Supreme Court of Minnesota in *Mayberry v. Northern Pacific Ry. Co.*, 100 Minn. 79, 110 N. W. 356, 12 L. R. A. (N. S.) 675, 10 Am. & Eng. Ann. Cas. 754 and note. See, also, section 6486, Rev. Codes.

2. It is contended that the complaint does not state facts sufficient to constitute a cause of action, for the reasons: (1) That there is no allegation to the effect that the defendants had any knowledge or notice, either actual or constructive, that the plaintiff intended to get down on the steps of the front platform of the car and to alight from the same; and (2) that the complaint does not show the place where the plaintiff was in the act of getting out of and off from the car was a usual place for the

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defendant company to stop its cars so as to allow passengers to alight or go aboard. This specification of error well illustrates the infirmity in plaintiff's case. It seems manifest that it either has some merit, or the court must hold, in response to another specification of error, that there was a fatal variance between the allegations of the complaint and the proof offered in support of those allegations. After a careful study of the language employed in this pleading, we are of opinion that it states facts sufficient to constitute a cause of action. It alleged that plaintiff's destination was Warren street; that the defendants undertook and agreed to deliver him there; that "while plaintiff * * * was at his destination, * * * when in the act of getting * * * off from said car, * * * the car was * * * started and put in motion * * * without allowing plaintiff sufficient time to get off, and in consequence thereof * * * plaintiff was * * * thrown to the ground and sustained great injuries. * * *"

We are unable to perceive how there can be a difference of opinion concerning the meaning of this language. It means that the car stopped at Warren street, and that while plaintiff was in the act of alighting, and before he had been given sufficient time for that purpose, it was suddenly started again, by reason of which he was thrown to the ground. This being true, the question whether defendants had notice that the particular passenger desired to alight becomes immaterial, so far as this case is concerned. To "start," as the word was employed in the pleading, means to cause to move; to set going; to give an initial impulse, as to start a train; to cause to begin to move; the beginning, as of a journey or course of action; initial impulse or movement; first motion from a place—opposed to finish. Webster's New International Dictionary (Ed. 1910). It does not mean that the movement of the car was accelerated. The allegation is that the car stopped at Warren street; otherwise it could not have started from that point. The averment that the car was put in motion bears out this construction; indeed, it is concurred in by respondent's counsel.

3. In the view we have taken of other matters presented by the appeal, it becomes unnecessary to consider whether the court erred in refusing to postpone the trial on account of the absence of certain witnesses on the part of the defendants.

4. It is contended that, aside from the other questions involved, the plaintiff failed to make out a case sufficient to go to the jury. We cannot agree with counsel in this. We think the jury was justified in concluding from plaintiff's testimony that he arose from his seat as the car approached Warren street, went out on the platform, and mentioned the name of the street to the motorman. This is the customary manner of signifying a desire that a car be stopped. The speed of the car was slackened and reduced to about four or five miles per hour, and he, under the

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impression that it was about to stop at the crossing, stepped down from the platform to the first step of the car, preparatory to alighting. The car did not stop, but continued at a slow rate of speed for some distance beyond the crossing, when suddenly, while he was in the same position and unable to determine whether it would stop in the immediate vicinity, its speed was increased with a violent jerk, and he was thrown off and injured. We think he established a *prima facie* case of negligence.

5. But it is contended by the appellants "plaintiff did not make the slightest attempt to prove the cause of action stated in the complaint, to wit, a cause of action based upon his being injured while he was getting off a car which had stopped at Warren street and which was started and put in motion while he was in the act of getting off." This contention must be sustained. There was an entire failure to prove the cause of action pleaded. The motion for a nonsuit should have been granted on that ground. Respondent cites the case of *Feagin v. Gulf, C. & S. F. Ry. Co.*, 45 Tex. Civ. App. 251, 100 S. W. 346, wherein the court said: "The gravamen of the charge upon which negligence was based was the sudden and violent jerking of the train before plaintiff had time to reach her seat, and it was entirely immaterial upon the issue of the alleged negligence of the defendant whether the train was absolutely stationary at the time she boarded it, or, as testified by her, 'was in motion of movement.' It would be just as negligent to suddenly and violently increase the speed of a train which had not entirely stopped, but upon which a passenger had been received without giving such passenger time to reach a seat, as it would be to suddenly start a train which had come to a full stop for the purpose of receiving such passenger." That case, however, is clearly distinguishable from the instant one. There defendant's alleged negligence occurred after plaintiff got upon the train. Here the electric railway company had a right to accelerate the speed of its car between stops; provided it did so in a reasonably careful manner; but it would have no right whatsoever to start a stationary car while a passenger was in the act of alighting. The defense to be interposed would be altogether different. Not only that, but the allegations of the complaint gave the defendants no notice that it would be claimed that the plaintiff was thrown from the car at a point 100 feet east of Warren street, by a violent jerk caused by a sudden increase of speed, while he was standing still on the steps of the car. He alleged that he was in the act of alighting, and the defendants might well have supposed that if they could prove that the car was in motion at the time, between cross streets, they might thereby exonerate themselves, either as a matter of law or in the estimation of the jury. And the question of notice to or knowledge of the motorman and conductor of plaintiff's position might become material if the speed of the

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car was merely increased; whereas, if the car had stopped at a customary and usual place, either on his signal or without signal, the servants of the company were bound to anticipate that some one might be alighting, and could not thereafter rightfully put the car in motion without giving a reasonable time to alight to all who desired to do so (*Ferry v. M. R. Co.*, 118 N. Y. 497, 23 N. E. 822), and would not be justified in moving the car at all while a passenger was in the act of getting off under the circumstances alleged in the complaint. If the plaintiff had been injured in the manner set forth in his complaint—that is, after the car had been stopped—it would make no difference whether or not he had theretofore indicated to the motorman the fact that he desired to alight at Warren street. On the other hand, if the car had not stopped, it became immaterial to inquire whether he had requested that it be stopped at that point. *Sims v. Metropolitan St. Ry. Co.*, 65 App. Div. 270, 72 N. Y. Supp. 835. In the latter case the question whether he spoke the word “Warren” to the motorman would throw considerable light upon the truth of his implied assertion that he expected the car would stop, and also upon the testimony of a witness who said that the car had passed Warren street before he started for the platform.

Another important question involved in the case, as shown by the testimony, is whether plaintiff caused his own injury by negligently getting off a moving car—a question of fact for the jury—whereas, in the case as pleaded, he had a right to get off where and when he did, and would probably have been guilty of no negligence in so doing. It is true that the plaintiff was a passenger; but when he either alleges in his pleadings, or shows by his proof, that he alighted from a car while the same was in motion, he must also show his reason for so doing. In other words, he must show the proximate cause of his injury to have been some negligence on the part of the defendant. The mere fact that a passenger is injured while alighting from a car is not alone sufficient to charge a railway company with responsibility therefor. See *Kennon v. Gilmer*, 4 Mont. 433, 2 Pac. 21; *Holbrook v. Railroad Co.*, 12 N. Y. 236, 64 Am. Dec. 502. As was said by the New York Court of Appeals, in the last case cited: “It is incorrect to say that the negligence of the carrier is to be presumed from the mere fact that an injury has been done to plaintiff. The presumption arises from the cause of the injury or from other circumstances attending it, and not from the injury itself.” The mere fact of an injury suffered by a passenger while on his journey, without any evidence connecting the carrier with its cause, is not sufficient to raise a presumption of negligence on the part of the carrier. 2 *Shearman & Redfield on Negligence*, § 516. See, also, *Mitchell v. Southern Pac. R. Co.*, 87 Cal. 62, 25 Pac. 245, 11 L. R. A. 130; *Pennsylvania R. Co. v. MacKinney*, 124 Pa. 462, 17 Atl. 14, 2 L. R. A. 820, 10

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Am. St. Rep. 601; Budd v. United Carriage Co., 25 Or. 314, 35 Pac. 660, 27 L. R. A. 279. Where, however, the injury is caused by some thing or agency for which the carrier is responsible, as, for instance, the condition of its tracks or roadbed, proof of that fact is, as a general rule, sufficient to raise a presumption of negligence. Proof of the derailment of a train is sufficient. Pierce v. Great Falls & C. Ry. Co., 22 Mont. 445, 56 Pac. 867; Hoskins v. Northern Pac. Ry. Co., 39 Mont. 394, 102 Pac. 988.

We conclude, therefore, that it was incumbent upon the plaintiff to prove some negligent act of the defendants which resulted in his injury, and that such negligent act must be the one, or one of those, set forth in the complaint. Also, that the cause of action proven is not set forth in the complaint in any of its essential particulars, and the cause of action pleaded is unproved in its general scope and meaning, resulting in a failure of proof. See section 6587, Rev. Codes; Forsell v. Pittsburgh & Mont. C. Co., 38 Mont. 403, 100 Pac. 218; Flaherty v. Butte Electric Ry. Co., 41 Mont. —, 107 Pac. 416. See, also, Cody v. Duluth St. Ry. Co., 94 Minn. 74, 102 N. W. 201, 397.

Respondent's brief is prefaced by an objection to the consideration by this court of the order overruling appellants' motion for a new trial. The objection is based upon the contention that the district court lost jurisdiction to pass upon the motion for a new trial because of the fact that the bill of exceptions was not served and filed within the time allowed by an order of the court. In view of what has been said by this court in Hill v. McKay, 36 Mont. 440, 93 Pac. 345, and State ex rel. Mackey v. District Court, 40 Mont. —, 106 Pac. 1098, we are of opinion that the objection is not tenable.

The judgment and order appealed from are reversed, and the cause is remanded for a new trial.

Reversed and remanded.

BRANTLY, C. J., and HOLLOWAY, J., concur.

SCHWARTZ *v.* MISSOURI, K. & T. RY. CO.NYE *v.* SAME.

(Supreme Court of Kansas, July 9, 1910.)

[109 Pac. Rep. 767.]

Carriers—Injuries to Passengers—Release of Liability—Mixed Trains.—Chapter 274 of the Laws of 1907, which provides that all freight trains to which a caboose is attached shall transport passengers, and permitting railroad companies to limit their liability to passengers on such trains, except for willful negligence, does not give the right to such companies to demand a release of their liability from a passenger upon a mixed train consisting of freight cars, a passenger coach, and a combination mail and baggage car, regularly operated, carrying passengers, and stopping at passenger platforms, as passenger trains usually do.

Carriers—Expulsion of Passengers—Punitive Damages.*—The expulsion of a passenger from a train such as is described above, for no other reason than that he refuses to sign such a release, is wrongful, but under the facts shown in these cases exemplary damages should not be awarded.

Johnston, C. J., and Benson, J., dissenting.

(Syllabus by the Court.)

Appeals from District Court, Miami County; W. H. Sheldon, Judge.

Actions by William Schwartz against the Missouri, Kansas & Texas Railway Company, and by Harry Nye against the same defendant. Judgments for plaintiffs, and defendant appeals. Judgments modified, and remanded for such modification.

John Madden, W. W. Brown, and R. E. Coughlin, for appellant.

Frank M. Sheridan, for appellees.

BENSON, J. The plaintiffs in these actions were passengers on one of the defendant's trains on the Kansas City division between Paola, Kan., and Sedalia, Mo. No. 515 was a west-bound train, and No. 516, was an east-bound train between the cities named. These trains were known as mixed trains, and each carried freight cars next to the engine, behind which were a

*For the authorities in this series on the question, when punitive or exemplary damages, can, and cannot, be recovered for wrongs to passengers, see foot-note of *St. Louis, etc., R. Co. v. Garner* (Miss.), 35 R. R. R. 185, 58 Am. & Eng. R. Cas., N. S., 185; last head-note of *Amann v. Chicago Consol. Traction Co.* (Ill.), 35 R. R. R. 141, 58 Am. & Eng. R. Cas., N. S., 141; foot-note of *Yazoo & M. V. R. Co. v. Fitzgerald* (Miss.), 34 R. R. R. 58, 57 Am. & Eng. R. Cas., N. S., 58.

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combination mail, baggage, and express car, and a passenger coach. These trains run on regular time, and are scheduled to connect at Paola with passenger trains for Kansas City, and stop at the platforms at stations to receive and discharge passengers. They carry the mail, and three-fourths of the passengers over that line and have been so operated for 13 years. The only other trains upon that division are two night freight trains, one running east and one west.

The plaintiffs took passage in train No. 516 from Paola to Louisburg. Each had a round trip ticket. Upon the demand of the agent at Paola each signed a release limiting the liability of the company as provided in chapter 274 of the Laws of 1907, for the trip to Louisburg. The conductor took up their tickets, leaving to them the return coupons. On the return passage upon train No. 515, while they were seated in the regular passenger coach with other passengers, the conductor took up the return coupons, and handed to each of them a release of liability for the return trip in the same form of those they had signed in going, and asked for their signatures. They refused to sign, whereupon the conductor informed them that they must do so or leave the train at the first station. They remonstrated, but the conductor persisted, saying that he had orders to enforce. Schwartz said: "All right, put me off, and we will investigate." At Somerset the train stopped at the platform and the conductor led Schwartz off the train. He then beckoned to Nye and said, "Come on," but Nye refused to move, when the conductor took hold of his coat collar, and pulled him into the aisle, and, as he still refused to move, pushed him to the door. The conductor then said, "Go on," but Nye said, "No," and the conductor gave him a push. Nye's foot slipped on the steps and he fell, straining his back. These circumstances are substantially as shown by the plaintiffs' evidence. The conductor's testimony was somewhat different, but upon the general findings for the plaintiffs their evidence must be taken as true. The plaintiffs obtained a carriage and reached their homes at Paola after a journey of three hours, at an expense of 50 cents each. The round trip tickets cost 75 cents each. The plaintiffs sued for damages for being put off the train. A verdict was rendered for Nye for \$400. By the special findings it appears that \$100 of this was for actual damages and \$300 for exemplary damages. The verdict for Schwartz was for \$205—\$5 for actual damages and \$200 for exemplary damages. The defendant appeals.

The first question presented is whether the train was a freight train within the meaning of chapter 274 of the Laws of 1907. This statute requires railroad companies to carry passengers on "freight trains to which a caboose is attached" upon a limitation of liability, except for willful negligence. It is insisted that this was a train such as the statute describes, as it included freight

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cars, and one of the coaches was used as a caboose. A caboose is a type of car generally well known, and clearly defined in the testimony. The train was regularly engaged in carrying passengers. Although freight cars were attached it was still a passenger train in the sense that it was regularly engaged in that service, making connections, stopping at regular passenger platforms, and carrying mail and baggage as well as passengers. Such trains are usual on branch lines, and it would be doing violence to the terms of the statute, as well as to common understanding and usage, to call such a mixed train a "freight train with caboose attached," within the purview of the statute. The right given by the statute to limit liability does not apply to such a train.

The remaining question relates to damages. It is contended that the facts do not warrant exemplary damages, and that the instructions permitting such recoveries were therefore erroneous. The conductor resorted to no harsh or abusive conduct and there was nothing in the manner or means by which he enforced the order to warrant such damages. The question remains, however, whether the defendant incurred a liability to pay such damages by issuing the order and causing it to be enforced. Exemplary damages may be awarded when a wrong has in it the element of negligence which is gross or wanton, or willfully oppressive. *Railroad Co. v. Little*, 66 Kan. 378, 71 Pac. 820, 61 L. R. A. 122. Damages for the inconvenience and humiliation suffered are actual rather than exemplary. *Dalton v. Railroad Co.*, 78 Kan. 232, 96 Pac. 475, 17 L. R. A. (N. S.) 1226; *Railroad Co. v. Little*, supra. If the appellant made this rule after a reasonable examination of the statute, and upon an honest belief that the train in question was a freight train within the meaning of the law; and that it therefore had the right to demand a release from passengers upon such a train, its conduct in making and enforcing the order cannot be held to be wanton, grossly negligent, or willfully oppressive. On the other hand if there was no reasonable grounds to interpret the statute as applying to such a train, then the promulgation and enforcement of the rule might be found willfully oppressive or grossly negligent. The opinion of the court is that it must be presumed in the absence of proof to the contrary that the regulation was made upon an honest, although mistaken, interpretation of the statute, and the exemplary damages ought not to have been awarded.

The finding of \$100 actual damages in the case of Nye must be sustained. There was testimony that he suffered personal injuries from the wrongful expulsion. The extent of such injuries and the resulting damages were matters for the jury to determine.

The judgments will be modified. In the case of Nye the recovery must be reduced to \$100, and in the case of Schwartz

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the recovery must be reduced to \$5, and the causes are remanded for such modifications.

BURCH, MASON, SMITH, PORTER and GRAVES, JJ., concurring.

BENSON, J. (dissenting). I do not concur in that part of the opinion relating to exemplary damages. It was a question of fact whether the conduct of the company in making and enforcing the rule was so willfully oppressive or grossly negligent as to afford a basis for exemplary damages.

I am authorized to say that Mr. Chief Justice JOHNSTON concurs in this dissent.

SOUTHERN RY. CO. v. NICHOLS.

(Supreme Court of Georgia, Aug. 10, 1910.)

[68 S. E. Rep. 789.]

Release—Pleading—Amendment—Procurement by Fraud.—In an action against a railroad company by an employee to recover damages for a personal injury, alleged to have been sustained by the employee while traveling as a passenger, where the railroad company pleads the employee's release upon a consideration of one dollar as accord and satisfaction, it is competent for the employee to amend his petition by alleging that the release was procured by fraud. An amendment which alleges that the employee was induced to sign the release upon the false representation of the agent that the company's surgeon pronounced his injury slight, and that he would be able to resume work in a few days, and upon the company's agent delivering to him at the time an order directing the employee's superior officer to restore him to his former situation, signing the superintendent's name, which order was issued without the superintendent's authority and repudiated by the company, and that as soon as he was refused employment he tendered the dollar to the agent who gave it to him, which tender was refused, is sufficient to raise the issue of fraud in the procurement of the release.

Pleading—Petition—Amendment.—The amendment related to a single subject-matter, and was properly incorporated in a single paragraph.

Removal of Causes—Diverse Citizenship.—Where in a joint action of negligence in the state court against three defendants a peremptory instruction is given on the trial in favor of the two defendants who are residents of the state, this does not entitle the other, although a citizen of another state, to remove the case to the United States court because of diverse citizenship.

Negligence—Injury to Passengers—Comparative Negligence—Instructions.—Where the court, after reading from Civ. Code 1895, § 2322, that "if the complainant and the agents of the railroad com-

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pany are both at fault, the former may recover, but the damages shall be diminished by the jury in proportion to the amount of default attributable to him," immediately added, "but in this connection I charge you that the plaintiff can in no event recover if he could by the exercise of ordinary care and diligence have prevented the injury," such instruction is not open to the criticism as authorizing a recovery, although the plaintiff's negligence may have been the preponderating cause of the injury.

Carriers — Injury to Passengers — Contributory Negligence.* — Where it appeared that a passenger having plenty of time to get on a train while it was standing waited until it began to move, and in an attempt to get on board by seizing the railing of the car his projecting body came in contact with a pair of trucks left near the track on the station premises, and thus he was injured, he cannot recover damages on the ground that the railroad company was negligent in allowing the trucks to be placed near the track.

(Syllabus by the Court.)

Error from Superior Court, Whitfield County; A. W. Fite, Judge.

Action by J. E. Nichols against the Southern Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

McDaniel, Alston & Black and *Maddox, McCamy & Shumate*, for plaintiff in error.

Geo. G. Glenn and *Westmoreland Bros.*, for defendant in error.

EVANS, P. J. James E. Nichols brought suit against the Southern Railway Company, R. C. Craig, its depot agent, and J. W. Walker, the agent of the Southern Express Company, to recover damages for personal injuries. He alleged that he was employed as an engineer on a freight train of the railway company; that he ran his train into Chattanooga, Tenn., where he boarded an outgoing passenger train for Atlanta, Ga.; that he had previously asked for and was expecting a telegraphic pass, authorizing him to be carried on the passenger train, and so informed the conductor; that the plaintiff inquired of the operator at Ooltewah, Tenn., at the office, and, the pass not being there, he reboarded the train and informed the conductor that he had not received

*For the authorities in this series on the question whether it is contributory negligence to board a moving train, see second paragraph of first foot-note of *Missouri Pac. Ry. Co. v. Irvin* (Kan.), 35 R. R. R. 187, 58 Am. & Eng. R. Cas., N. S., 187.

For the authorities in this series on the subject of the liabilities of carriers for injuries to passengers from collisions with objects or structures near tracks, see last paragraph of second foot-note of *Lockwood v. Boston Elev. Ry. Co.* (Mass.), 31 R. R. R. 395, 54 Am. & Eng. R. Cas., N. S., 395.

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the pass, but that he would get it when the train reached Dalton; that the conductor assented to this; that, when they reached Dalton, the plaintiff left the train, went into the office, and inquired about the pass, and, learning that it was not there, he determined to reboard the train and pay his fare; that, before he had time to get on, the train, without warning, started off, and he had to run to catch it; that he caught the train safely, and, while in the act of swinging himself on the steps and platform, his body came in contact with a pair of trucks which had been left so close to the coach as to strike him, knocking him off the steps before he swung his body clear; that but for the trucks striking him he would have boarded, as it was not moving so fast as to be dangerous to do so, he frequently having boarded trains safely going at a higher speed; that Craig, the depot agent, was negligent, in that it was his duty to see that the trucks were not left so near the side of the coach as to endanger passengers or others in attempting to board the car, and he failed to perform this duty; that the trucks belonged to the Southern Express Company, and had been placed so near the side of the coach as to endanger passengers or others attempting to board the train, and the express agent either placed the trucks there or allowed them to be so placed, which was negligence on his part; and that the conductor was negligent in starting the train without giving him time to get back from the office to board the same. The railroad company filed its plea, and at the trial amended it by setting up an accord and satisfaction, in that the plaintiff had been settled with, and in consideration of \$1 had signed a release covering the injuries sued for, whereupon the plaintiff amended his declaration, attacking the plea of accord and satisfaction, and alleging that the release was procured by fraud. The defendants demurred to the amendment, and the demurrer was overruled. At the conclusion of the evidence, the court announced that he would instruct the jury that there could be no recovery against Craig and Walker, whereupon the railroad company filed its petition to remove the cause to the United States court. The petition was in the form prescribed by the act of Congress, and was accompanied with a bond. The court refused to grant the order of removal, and exception was taken. Pending the argument, the plaintiff again amended his declaration, alleging an additional act of negligence. A verdict was rendered for the plaintiff. The defendants moved for a new trial, which being refused, they excepted.

1, 2. The demurrer to the amendment attacking the release set up by the defendant as a plea of accord and satisfaction was upon the grounds that it was not set out in orderly paragraphs, consecutively numbered; that the facts alleged were insufficient to constitute fraud; that it did not appear that the tender was a

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continuing one, or made to a person having authority to receive it; and that the amendment undertook to vary a written contract. The original petition set out that the plaintiff had received serious and permanent injuries. The amendment alleged that the plaintiff would not have settled with the company for the nominal sum of \$1 except that the agent of the company had practiced an artifice to obtain the release. The device was a false representation by the agent that the surgeons of the defendant company, who alone had examined the plaintiff, pronounced his injuries of a trifling character, and the assurance that he would be allowed to resume his work as an engineer of the freight train. This assurance was in the form of an order purporting to be signed by the superintendent of the defendant company, afterwards repudiated by him and the company. If these be the facts, it is apparent that the plaintiff accepted a nominal sum in settlement of his injuries because of this artifice. A contract obtained under such circumstances is fraudulently procured. As soon as the plaintiff discovered that the agent's representations were false, and that the company would not allow him to continue in its employment, he tendered the money back to the company's agent from whom he received it. He properly tendered the money to the same person whom the company used as a means of obtaining the execution of the paper. The amendment related to only one subject-matter, and could properly be incorporated in a single paragraph.

3. The right to remove to the federal court a suit against three tort-feasors, one of whom is a nonresident, is dependent upon the case as made upon the pleadings, and is not contingent on the aspect the case may have assumed on the facts developed on the merits of the issues tried. The petition presented a joint cause of action against the resident and nonresident defendants. A peremptory instruction given upon the trial in favor of the two defendants who were residents of the state does not entitle the other, although a citizen of another state, to remove the case to the federal court because of diverse citizenship. *Kansas City, etc., Ry. Co. v. Herman*, 187 U. S. 63, 23 Sup. Ct. 24, 47 L. Ed. 76; 2 Foster's Federal Practice, § 348 (b).

4. The court charged the jury in the language of Civ. Code 1895, § 2322, that: "No person shall recover damages from a railroad company for injury to himself or his property when the same is done by his consent, or is caused by his own negligence. If the complainant and the agents of the company are both at fault, the former may recover, but the damages shall be diminished by the jury in proportion to the amount of default attributable to him." This last sentence is said to be error, because it authorized a recovery if the plaintiff's negligence was equal to, or greater than, that of the defendant's. An inspection of the charge shows that immediately after reading this

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section the court added: "But in this connection I charge you that the plaintiff can in no event recover if he could by the exercise of ordinary care and diligence have prevented the injury." The qualification which the court put upon Civ. Code, § 2322, is that contained in Civ. Code, § 3830, which two sections are in *pari materia*; and neither did the court confuse the two sections, nor was the charge open to the criticism that the plaintiff was entitled to recover if his negligence was equal to, or greater than, that of the defendant's. Indeed, the charge was modeled after the form suggested in *Americus, etc., Railroad Co. v. Luckie*, 87 Ga. 6, 13 S. E. 105.

5. If a passenger is given ample time to get on a train before it starts from the station, and he needlessly waits until the train is in motion before attempting to board it, and is injured in his effort to get aboard, but not from any negligence of the company, the latter would not be liable in damages for the injury. *Ricks v. Georgia Southern & Florida R. Co.*, 118 Ga. 259, 45 S. E. 268; *Meeks v. A. & B. Railroad Co.*, 122 Ga. 266, 50 S. E. 99. However, if it may be inferred from the circumstances that the passenger was not lacking in ordinary care in attempting to board the car in motion, and would not have been injured but for some supervening negligent act of the railroad company, it should be left to the jury to determine the relative diligence of the company and the passenger. If the company was negligent in allowing an obstruction upon the depot premises so near the track, and the passenger in boarding the car exercised ordinary care, he would be entitled to recover. On the other hand, if the company was not negligent, or if the passenger failed to observe due care in boarding the train, he could not recover. It then becomes necessary, in reaching a conclusion in the case, to ascertain whether the evidence showed that the plaintiff's injury was caused by the failure of the railroad company to discharge any duty that it owed to him as a passenger. The plaintiff had been assured by the train dispatcher that he would be given a telegraphic pass, and was riding upon the car, with the consent of the conductor, expecting that the pass would be delivered at an intermediate station. When the train stopped at Dalton, the plaintiff left the car and entered the station house to inquire if his pass had been received. The telegraph operator informed him that he had not received it, but was wiring for it. According to the plaintiff's own testimony, after having received this information from the operator, he had ample time to return and board the train while it was stopped. Instead of doing this, he tarried in the station house to converse with a friend, and while thus engaged he saw the train moving off, and immediately ran to catch it. His purpose was to get aboard the forward end of the first-class coach, but a man was in his way, and he waited until the rear end of the coach reached him,

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when he seized the railing, and just as he placed his feet upon the steps for the purpose of drawing himself up he was struck by the trucks and knocked under the car. The plaintiff said the trucks which knocked him off were those employed by the company for handling the baggage. One of his witnesses declared that they belonged to the Southern Express Company, and were used in the express business. There was no dispute that the train stopped at the usual place sufficiently long to receive and discharge passengers. The train officers testified that the usual signals were given for the train to start. The plaintiff, who was in the station house talking with a friend, said he did not hear the signal. We do not think this negative testimony sufficient to raise a conflict on this point. The only act which the plaintiff by his testimony seeks to impute to the company as negligence is that contained in the amendment. There it was alleged that it was the duty of the railroad company to keep its depot premises in a reasonable safe condition, and free from obstructions so near its track as to endanger passengers in leaving or boarding its train, when in the exercise of ordinary care; that the railroad company failed to observe this duty when it permitted the trucks which struck the plaintiff to be placed dangerously near the track; that these trucks were an obstruction in plain view of the conductor in charge of the train, and it was negligent in him to move the train before the trucks had been moved to a safe way from the track, as passengers were in the habit of boarding the cars while in motion, and this was known to the conductor. In *Central Railroad Co. v. Perry*, 58 Ga. 468, it was said by Bleckley, J., that "ordinarily a railroad company has a right to expect that passengers will get on and off at the place provided for them, and there only. It cannot be stated as a proposition of law that it is its duty to keep the track clear for pursuers, or that a passenger has a right to chase a flying train. As a general rule, on the contrary, no such duty or right exists, and, for the sake of the public as well as of the company, it is better they should not exist." It is unquestionably true that a railroad company must use due care in providing a reasonably safe place at depots and regular stopping places, so as to enable passengers to get on the train with safety to their person, and not move its train until passengers are given a reasonable opportunity to get off and on the cars. When the railroad company discharged its duty in this respect, it did not owe to the plaintiff the further duty to provide means by which he could board the cars while in motion. *Simmons v. Seaboard Air Line Ry.*, 120 Ga. 225, 47 S. E. 570; *Chicago & Southwestern Ry. Co. v. Scates*, 90 Ill. 586. The plaintiff, therefore, failed to show that the railroad company was negligent, and his injury was the consequence of his own voluntary act.

We have discussed the case on the hypothesis that the plain-

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tiff was injured by coming in contact with the trucks. It was the contention of the railroad company (and evidence was submitted tending to prove it) that the plaintiff was in an intoxicated condition, and was injured by slipping from the steps in his effort to board the train, and was not struck by the trucks at all. The evidence did not warrant the verdict; and some of the instructions were not altogether in harmony with the views expressed herein. The rulings on the exclusion and admission of evidence were not erroneous.

Judgment reversed.

BECK, J., absent. The other Justices concur.

TRUSSELL v. MORRIS COUNTY TRACTION CO.

(Court of Errors and Appeals of New Jersey, Sept. 16, 1910.)

[77 Atl. Rep. 535.]

Carriers—Carriage of Passengers—Duty to Carry Safely.*—A company operating an electric street railway car is bound to exercise a high degree of care to carry its passengers safely in and upon whatever part of the car they ride with the express or implied consent of the company.

Carriers—Negligence of Passenger Riding on Step of Platform.†—It is not negligence per se for a passenger to ride upon the step of the platform of an electric street railway car.

Carriers—Injury to Passenger—Action—Question for Jury—Negligence.—Where the evidence tends to show that the plaintiff's intestate with the defendant's consent rode as a passenger upon the step of the platform of the defendant's electric street railway car because there was no room on the platform or in the car, and that while he was so riding, with his back to the road, holding on to the stanchion with his right hand, the servants of the defendant, without any warning to decedent, drove the car at a speed of 20 miles an hour around a "sharp curve," whereby the decedent was thrown to the ground ten feet distant from the track and killed, both the questions of the negligence of the defendant and the contributory negligence of the decedent are for the jury.

(Syllabus by the Court.)

*For the authorities in this series on the subject of the degree of care required of a street railway as a carrier of passengers, see *Beattie v. Detroit United Ry.* (Mich.), 33 R. R. R. 192, 56 Am. & Eng. R. Cas., N. S., 192.

†See last foot-note of *Heinze v. Interurban Ry. Co.* (Iowa), 30 R. R. R. 330, 53 Am. & Eng. R. Cas., N. S., 330.

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Error to Supreme Court.

Action by Julia Trussell, administratrix of Richard F. Trussell, against the Morris County Traction Company. Judgment of nonsuit, and plaintiff brings error. Reversed, and new trial awarded.

Charlton A. Reed, for plaintiff in error.

Willard W. Cutler, for defendant in error.

TRENCHARD, J. This action was brought by the administratrix of Richard F. Trussell to recover damages for his death. At the trial at the Morris circuit the evidence tended to show the facts following: The decedent was a passenger on one of the defendant's electric street railway cars running from Dover to the "ball ground" located between Dover and Rockaway. The car, both inside and on its platforms, was crowded with passengers. Because of the crowded condition of the car, he necessarily took a place on the step of the rear platform, with his back to the road, holding on to the stanchion with his right hand, and while standing in that position paid his fare to the conductor, who made no objection to his riding on the step. The car proceeded with the decedent in that position towards the ball grounds, at a speed of 20 miles an hour, and without slackening speed, and without any warning to decedent, went around a "sharp curve," thereby throwing the decedent to the ground 10 feet distant from the track, and killing him. When the plaintiff rested, the learned trial judge granted a motion to nonsuit based upon the grounds (1) that the evidence disclosed no negligence upon the part of the defendant company, and (2) that it conclusively appeared that the decedent was guilty of contributory negligence. Upon the judgment entered in pursuance of the nonsuit the writ in this case was brought, and the nonsuit is assigned for error.

We are of the opinion that the nonsuit cannot be supported upon either ground. A company operating an electric street railway car is bound to exercise a high degree of care to carry its passengers safely in and upon whatever part of the car they ride with the express or implied consent of the company. *Scott v. Bergen County Traction Co.*, 63 N. E. J. Law, 407, 43 Atl. 1060; *Hansen v. North Jersey Street Railway Co.*, 64 N. J. Law, 686, 46 Atl. 718; *City Railway Co. v. Lee*, 50 N. J. Law, 435, 14 Atl. 883, 7 Am. St. Rep. 798; *Consolidated Traction Co. v. Thalheimer*, 59 N. J. Law, 474, 37 Atl. 132; *Whalen v. Consolidated Traction Co.*, 61 N. J. Law, 606, 40 Atl. 645, 41 L. R. A. 836, 68 Am. St. Rep. 723. As we have pointed out the evidence warranted the inference that the decedent was riding upon the step of the platform with the consent of the defendant company. The evidence also tended to show that under these circumstances

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the servants of the defendant company, without any warning to decedent, drove the car around a "sharp curve" at a speed of 20 miles an hour. Clearly the jury might well have found that reasonable foresight upon the part of the defendant's servants operating the car should have anticipated the possibility that the decedent would be thrown from the car, and that reasonable care required that they should guard against it either by checking the speed of the car, or warning the decedent of the danger. This they did not do. It may be inferred that the managers of the car knew, and the decedent did not know, that the car was about to take the "sharp curve" which was dangerous to the decedent in his situation. The question of negligence of the defendant company was therefore for the jury.

We are of the opinion, too, that the alleged contributory negligence of the decedent was not under the evidence a court question. It is not negligence per se for a passenger to ride upon the step of the platform of an electric street railway car. *Scott v. Bergen County Traction Co.*, 63 N. J. Law, 407, 43 Atl. 1060; *Nirk v. Jersey City, H. & P. St. Ry. Co.*, 75 N. J. Law, 642, 68 Atl. 158. In *City Railway Co. v. Lee*, 50 N. J. Law, 435, 14 Atl. 883, 7 Am. St. Rep. 798, Mr. Justice Knapp, speaking for this court, quoted with approval the language of the Massachusetts Supreme Judicial Court in *Messel v. Lynn R. R. Co.*, 8 Allen, 234, as follows: "The seats inside the car are not the only places where the managers expect passengers to remain, but it is notorious that they stop habitually to receive passengers to stand inside the car until the car is full, then to stand upon the platforms until they are full, and continue to stop and receive them even after there is no place to stand except on the steps of the platforms. Neither the officers of these corporations, nor the managers of the cars, nor the traveling public, seem to regard this practice as hazardous, nor does experience thus far seem to require that it should be restrained on account of its danger. There is therefore no basis upon which the court can decide on the evidence that the plaintiff did not use ordinary care." It is true that a passenger who voluntarily rides upon the platform step when there is room for him inside the car takes upon himself the duty of looking out for, and of protecting himself against, the usual and obvious perils attendant upon his position, such as the danger of being thrown from the steps by the ordinary jolting and swinging of the car. *Nirk v. Jersey City, H. & P. St. Ry. Co.*, 75 N. J. Law, 642, 68 Atl. 158, and cases there cited. But, as we have pointed out, the evidence justified the inference that the decedent rode upon the platform step from necessity, because there was no room on the platform, or in the car, and that he occupied that position with the consent of the defendant. Moreover, it was clearly open to the jury to find that the peril which the decedent encountered was not one

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of those usual and obvious perils attendant upon his position, but rather was the result of the negligent driving of the car. The alleged contributory negligence of the decedent was therefore for the determination of the jury.

The judgment of the court below will be reversed, and a venire *dē novo* awarded.

MOORE v. ATCHISON, T. & S. F. Ry. Co.

(Supreme Court of Oklahoma, July 12, 1910.)

[110 Pac. Rep. 1059.]

Appeal and Error—Review—Harmless Error—Exclusion of Evidence.—If certain evidence be admissible, yet, if, upon the entire record, its exclusion could not under any event operate to the prejudice of the party offering same, such exclusion is not a reversible error.

Principal and Agent—Corporations—Carriers—Acts of Servant or Agent—Torts.*—Under the decisions controlling in the territory of Oklahoma, punitive or vindictive damages are not to be allowed as against the principal, unless the principal participated in the wrongful act of the agent, expressly or impliedly, by his conduct authorizing it or approving it either before or after it was committed.

(a) For acts done by the agents of a corporation in the course of its business and their employment, the corporation is responsible in the same manner and to the same extent as an individual is responsible under similar circumstances.

(b) A corporation is liable, like an individual, to make compensation for any tort committed by an agent in the course of his employment, although the act is done wantonly and recklessly or against the express orders of the principal.

(c) A corporation, like a natural person, may be held liable in exemplary or punitive damages for an act by an agent within the scope of his employment, providing the criminal intent necessary to

*For the authorities in this series on the question whether a railroad company can be held liable for willful, wanton, or malicious torts of its employees, see foot-note of *Charleston & W. C. Ry. Co. v. Devlin* (S. Car.), 35 R. R. R. 341, 58 Am. & Eng. R. Cas., N. S., 341.

For the authorities in this series on the question whether exemplary or punitive damages can be recovered against a railroad for wrongs to its passengers, see foot-note of *St. Louis, etc., R. Co. v. Garner* (Miss.), 35 R. R. R. 185, 58 Am. & Eng. R. Cas., N. S., 185; foot-note of *Amann v. Chicago Consol. Traction Co.* (Ill.), 35 R. R. R. 141, 58 Am. & Eng. R. Cas., N. S., 141; foot-note of *Yazoo & M. V. R. Co. v. Fitzgerald* (Miss.), 34 R. R. R. 58, 57 Am. & Eng. R. Cas., N. S., 58.

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warrant the imposition of such damages is brought home to the corporation.

(d) A corporation, as an individual, if any wantonness or mischief on the part of an agent acting within the scope of his employment causes additional injury to the plaintiff in body or mind, is liable to make compensation for the whole injury suffered.

(e) A railroad corporation, without participating in such wanton acts, cannot be charged with punitive or exemplary damages for the illegal, wanton, and oppressive conduct of a conductor or brakeman of one of its trains toward a passenger.

Carriers—Carriage of Passengers—Personal Injuries—Contributory Fault.—A passenger, having been ejected from the passenger train of the defendant in error on the alleged ground of his failure to furnish a ticket or pay his fare, as the train began moving attempted to re-enter same, and, getting upon the steps of one of the cars, the brakeman kicked said party so as to cause him to lose his hold and fall from the moving train, sustaining an injury. Held, that under such assumed state of facts the act of the brakeman was a willful assault, and therefore the party, though not entitled to re-enter said train, in placing himself in such position, was not a contributing cause of the injury.

(Syllabus by the Court.)

Error from District Court, Noble County; B. F. Hainer, Judge.

Action by Samuel H. Moore against the Atchison, Topeka & Santa Fé Railway Company. From a judgment in favor of defendant, plaintiff brings error. Reversed, with instructions to grant a new trial.

Henry S. Johnson, for plaintiff in error.

Cottingham & Bledsoe, George M. Green, and Devereux & Hildreth, for defendant in error.

WILLIAMS, J. The following questions on this record are essential for determination:

(1) Did the court err in excluding what was said by other parties to the conductor after the controversy arose, but before his final ejection from the car, between him and the plaintiff in error as to his having bought a ticket?

(2) Did the court err in instructing the jury that the plaintiff in error was not entitled to recover punitive or exemplary damages, sometimes called "smart money"?

(3) Did the court err in giving instruction No. 8, in part as follows: "Likewise, if he attempted to board the train on the rear end of the Pullman or sleeper, after the train had started to move, and after the doors were closed, he had no right to board that train, and if he sustained any injuries while attempt-

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ing to get on the rear end of the train while it was moving out of the station, or about to move from the station, and if he thereby sustained any injuries, the company would not be liable for such injuries."

1. The following proceedings were had: "Q. State what happened to you when you were being put off. A. Well there were five or six told the conductor I had a ticket and they saw me buy it. Mr. Green (attorney for defendant in error): We object to what other people said. The Court: Objection sustained. * * * Q. State if any person other than yourself informed the conductor that they had seen you buy the ticket. A. Yes, sir. Mr. Green: To which the defendant objects. The Court: Objection sustained."

A drummer by the name of Miller testified that, before his (plaintiff in error S. H. Moore's) ejection from the car was consummated, "I myself told the conductor * * * that I saw Mr. Moore give him a ticket. I told him that another gentleman says, I saw him buy the ticket. * * * Part of this conversation arose while they were taking him from the seat. I told the conductor I saw him give him a ticket, and another gentleman by the name of Robinson told him that he saw him buy a ticket, and after a little Mr. Robinson vouched that he saw him buy the ticket at Salina, Kan., and there was 13 people in the crowd that Mr. Robinson was at the head of and they all vouched for seeing him buy the ticket. Q. Did they say that to the conductor?" On objection the court ruled that "What the witness (Miller) told Wilcox (the conductor) is competent." "Mr. Harris (attorney for defendant): I asked that the statements of the witness outside of any statements to the conductor with reference to having seen the ticket purchased be stricken out as incompetent. The Court: Objection sustained as to the other statements except that of the witness."

The question of the good faith of the conductor in ejecting the plaintiff from the train was an issue submitted to the jury. and if, as a reasonable person, he ejected the plaintiff from the train, honestly believing that he had not delivered him a ticket, the jury were justifiable in finding that he acted in good faith.

The following special questions were submitted to the jury:

"Q. 2. Do you allow anything for injury to plaintiff's feelings, and, if so, how much? A. Sixty dollars (\$60.00).

"Q. 3. Did the conductor, porter, or brakeman use any violence towards the plaintiff at the time he was first ejected? A. To a limited degree.

"Q. 4. How much do you allow plaintiff by reason of the violence used by the conductor, brakeman, or porter? A. Nothing.

"Q. 5. How much do you allow plaintiff for actual injuries? A. Nothing except mental injury.

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"Q. 6. How much do you allow plaintiff for loss of time?

A. Two dollars (\$2.00).

"Q. 7. How much do you allow plaintiff for inconvenience in remaining over in Derby? A. Two dollars (\$2.00).

"Q. 8. Was it the custom of the conductor to give a check to a passenger for his ticket? A. Sometimes.

"Q. 9. Did the conductor act in good faith, and with an honest belief that the plaintiff had not paid his fare to Perry? A. Yes.

"Q. 10. Did the conductor or any of the other employees act in a malicious or wanton manner toward the plaintiff? A. To a limited degree.

"Q. 11. How much time did he lose? A. One day.

"Q. 12. What was his time worth per day? A. Two dollars (\$2.00)."

The general verdict was in favor of the plaintiff on all the issues, assessing the amount of his recovery at the sum of \$66.85. See section 1789, vol. 3, Wigmore on Evidence (1904).

The conductor testified, in substance, that he did not remember the witness Miller telling him that he saw the plaintiff give him a ticket; that he might have said it; that he would not deny that such statement was made, but, if it was made, he had no recollection of it. The conductor further testified in *hæc verba*: "No, they said he had been riding on the train. They had seen him on the train. I do not deny that the passenger bought a ticket. I do not deny that. I did not question that at the time. The question was whether two men were riding on it or not. I wanted my receipt for my ticket to Perry, which I had given the passenger if he gave me a ticket to Perry. I work my train carefully and still know what I am doing. I have had lots of experience in that line."

The witness Miller having been permitted to testify that he told the conductor that he saw the plaintiff (Moore) give him a ticket, and the conductor having stated to the jury at the time that he ejected the plaintiff from the train that he did not question the fact that the (plaintiff in error) had bought a ticket at the initial point of his journey, but what he did question was as to whether the same had been delivered to him by the plaintiff, etc., and, if so, where the hat ticket he gave him was. Conceding, but not deciding, that the excluded statements were admissible, we fail to see wherein there was any prejudicial error thereby committed against the plaintiff in error.

2. This action arose under the territory of Oklahoma, having been tried in the lower court prior to the erection of the state, and after such date, an appeal therefrom being prosecuted to this court, it was an existing suit, not finally determined.

Section 1 to the Schedule of the Constitution of Oklahoma provides that no existing rights, actions, suits, proceedings, contracts, or claims shall be affected by the change in the forms of

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government, but all shall continue as if no change in the forms of government had taken place.

In the case of *St. Louis & San Francisco Railroad Co. v. Cundieff*, 171 Fed. 319, 96 C. C. A. 211, it is said: "Construing all of these provisions together, we are of opinion that they do not change, and were not intended to change, the method of procedure in cases pending in the courts of Indian Territory and of the territory of Oklahoma, but that the civil cases pending in the Indian Territory should, after statehood, continue under the law in force in the Indian Territory, and under that law no reply was required, prior to statehood. We do not think that the provision of the Constitution relied upon by the railroad company so changes the situation as to make a reply necessary."

In the case of *Freeman v. Eldridge* (No. 535, decided at this term, but not yet officially reported) 110 Pac. 1057, this excerpt was quoted at length and the rule therein announced followed. See, also, *Sullivan v. Mercantile Town Mut. Ins. Co.*, 20 Okl. 460, 94 Pac. 676, 129 Am. St. Rep. 761. Adhering to the same rule, as to existing suits under the territory of Oklahoma, the decisions of the Supreme Court of the United States having been controlling upon the Supreme Court of said territory, this court is bound by the same.

In the case of *Lakeshore & Michigan, etc., R. Co. v. Prentice*, 147 U. S. 101, 13 Sup. Ct. 261, 37 L. Ed. 97, Mr. Justice Gray, in delivering the opinion of that court, said: "The law applicable to this case has been found nowhere better stated than by Mr. Justice Brayton, afterwards Chief Justice of Rhode Island, in the earliest reported case of the kind, in which a passenger sued a railroad corporation for his wrongful expulsion from a train by the conductor, and recovered a verdict, but excepted to an instruction to the jury that 'punitive or vindictive damages, or smart money, were not to be allowed as against the principal participating in the wrongful act of the agent, expressly or impliedly, by his conduct authorizing it or approving it, either before or after it was committed.' This instruction was held to be right, for the following reasons: 'In cases where punitive or exemplary damages have been assessed, it has been done upon evidence of such willfulness, recklessness, or wickedness, on the part of the party at fault, as amounted to criminality, which for the good of society and warning to the individual ought to be punished. If in such cases, or in any case of a civil nature, it is the policy of the law to visit upon the offender such exemplary damages as will operate as punishment and teach the lesson of caution to prevent a repetition of criminality, yet we do not see how such damages can be allowed, where the principal is prosecuted for the tortious act of his servant, unless there is proof in the cause to implicate the principal and make him particeps criminis of the agent's act. No man should be punished for that of which

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he is not guilty.' 'Where the proof does not implicate the principal, and, however wicked the servant may have been, the principal neither expressly nor impliedly authorizes or ratifies the act, and the criminality of it is as much against him as against any other member of society, we think it is quite enough that he shall be liable in compensatory damages, for the injury sustained in consequence of the wrongful act of a person acting as his servant.' *Hagan v. Providence & W. R. Co.*, 3 R. I. 88, 91 [62 Am. Dec. 377]. The like view was expressed by the Court of Appeals of New York, in an action brought against a railroad corporation by a passenger for injuries suffered by the neglect of a switchman, who was intoxicated at the time of the accident. It was held that evidence that the switchman was a man of intemperate habits, which was known to the agent of the company, having the power to employ and discharge him and other subordinates, was competent to support a claim for exemplary damages; but that a direction to the jury in general terms that in awarding damages they might add to full compensation for the injury 'such sum for exemplary damages as the case calls for, depending in a great measure of course upon the conduct of the defendant' entitled the defendant to a new trial; and Chief Justice Church, delivering the unanimous judgment of the court, stated the rule as follows: 'For injuries by the negligence of a servant while engaged in the business of the master, within the scope of his employment, the latter is liable for compensatory damages; but for such negligence, however gross or culpable, he is not liable to be punished in punitive damages unless he is also chargeable with gross misconduct. Such misconduct may be established by showing that the act of the servant was authorized or ratified, or that the master employed or retained the servant, knowing that he was incompetent, or, from bad habits, unfit for the position he occupied. Something more than ordinary negligence is requisite; it must be reckless and of a criminal nature, and clearly established. Corporations may incur this liability as well as private persons. If a railroad company, for instance, knowingly and wantonly employs a drunken engineer or switchman, or retains one after knowledge of his habits is clearly brought home to the company, or to a superintending agent authorized to employ and discharge him, and injury occurs by reason of such habits, the company may and ought to be amenable to the severest rule of damages; but I am not aware of any principle which permits a jury to award exemplary damages in a case which does not come up to this standard, or to graduate the amount of such damages by their views of the propriety of the conduct of the defendant, unless such conduct is of the character before specified.' *Cleghorn v. New York Cent. & H. R. R. Co.*, 56 N. Y. 44, 47, 48 [15 Am. Rep. 375]. It must be admitted that there is a wide divergence in the decisions of the

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state courts upon this question, and that corporations have been held liable for such damages under similar circumstances in New Hampshire, in Maine, and in many of the Western and Southern states. But of the three leading cases on that side of the question, *Hopkins v. Atlantic & St. L. R. Co.*, 36 N. H. 9 [72 Am. Dec 287], can hardly be reconciled with the later decisions in *Fay v. Parker*, 53 N. H. 342 [16 Am. Rep. 270], and *Bixby v. Dunlap*, 56 N. H. 456 [22 Am. Rep. 475], and in *Goddard v. Grand Trunk R. Co. of Canada*, 57 Me. 202, 228 [2 Am. Rep. 39], and *Atlantic & G. W. R. Co. v. Dunn*, 19 Ohio St. 162, 590 [2 Am. Rep. 382], there were strong dissenting opinions. In many, if not most, of the other cases, either corporations were put upon different grounds in this respect from other principals, or else the distinction between imputing to the corporation such wrongful act and intent as would render it liable to make compensation to the person injured, and imputing to the corporation the intent necessary to be established in order to subject it to exemplary damages by way of punishment, was overlooked or disregarded. Most of the cases on both sides of the question, not specifically cited above, are collected in 1 Sedgwick, *Damages* (8th Ed.) § 380. In the case at bar, the plaintiff does not appear to have contended at the trial, or to have introduced any evidence tending to show, that the conductor was known to the defendant to be an unsuitable person in any respect, or that the defendant in any way participated in, approved, or ratified his treatment of the plaintiff; nor did the instructions given to the jury require them to be satisfied of any such fact before awarding punitive damages. But the only fact which they were required to find in order to support a claim for punitive damages against the corporation was that the conductor's illegal conduct was wanton and oppressive. For this error, as we cannot know how much of the verdict was intended by the jury as a compensation for the plaintiff's injury, and how much by way of punishing the corporation for an intent in which it had no part, the judgment must be reversed, and the case remanded to the circuit court, with directions to set aside the verdict, and to order a new trial."

This case was followed by the Supreme Court of the territory of Oklahoma in *A., T. & S. F. R. R. Co. v. Chamberlain*, 4 Okl. 547, 46 Pac. 499. Said case was binding upon the trial court, and by virtue of section 1 to the Schedule of the Constitution, heretofore referred to, controls this court, and, therefore, there is no reversible error in the court's withdrawing from the consideration of the jury the question of punitive damages or smart money.

3. But it is insisted that the trial court erred in refusing to submit to the jury the question as to damages on account of the brakeman's alleged kicking the plaintiff from the rear end

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of the car after the train had started to move, and after the doors were closed, and excluding the same from the consideration of the jury. This act was denied by the brakeman; but, if upon the theory of the plaintiff he was entitled to recover, such issue should have been submitted to the jury under proper instructions. Section 1394, Comp. Laws 1909 (section 1050, St. Okla. T. 1893), provides: "If any passenger shall refuse to pay his fare, it shall be lawful for the conductor of the train and the servants of the corporation to put him and his baggage out of the cars in the following manner: A passenger who refuses to pay his fare, or to conform to any lawful regulation of the carrier, may be ejected from the vehicle by the carrier. But this must be done with as little violence as possible, and at any usual stopping place, or near some dwelling house. After having ejected a passenger, a carrier has no right to require the payment of any part of his fare."

After a passenger has been ejected for refusal to pay his fare, the conductor seems to have a right to refuse to accept such party who sought to again board the car, and, after such refusal, to use a reasonable degree of force to prevent such person from boarding and entering the car, and for that purpose to lay hands upon him and interfere with his person, using no more force than was reasonably necessary, though having no right to use any excessive or unreasonable force, or to attack wantonly any such intending passenger. *Sullivan v. Boston Elevated Ry. Co.*, 199 Mass. 73, 84 N. E. 844, 21 L. R. A. (N. S.) 36; *Webster v. Fitchburg R. Co.*, 161 Mass. 298, 37 N. E. 165, 24 L. R. A. 521; *Merril v. Eastern R. Co.*, 139 Mass. 238, 1 N. E. 548, 52 Am. Rep. 705; *Hogner v. Boston Elev. R. Co.*, 198 Mass. 260, 84 N. E. 464, 15 L. R. A. (N. S.) 960; *Solomon v. Manhattan R. Co.*, 31 Hun, 5; *Stone v. N. W. R. Co.*, 47 Iowa, 82, 29 Am. Rep. 458.

In *Pickens v. Richmond, etc., R. Co. et al.*, 104 N. C. 312, 10 S. E. 556, it was held: "When a person is put off a train for refusal to pay fare, at a regular station, or so near it that he can reach it while the train is stopping there, and buys a ticket from such depot to some point in the direction in which he is traveling, the weight of authority is in favor of the rule that he can be required, even then, to pay charges for the distance that he previously rode on the train without a ticket, and be ejected for refusal to do so." But this question not being essential for determination in order to dispose of this case, we do not pass thereon.

The contention here raised is that the plaintiff was entitled to ride on said train, having bought and paid for a ticket and delivered same to the conductor, entitling him to ride, and, being wrongfully ejected from the car, immediately thereafter sought to re-enter the same whilst it was moving, and whilst upon or

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hanging to the steps and in a dangerous position the brakeman wantonly and willfully kicked plaintiff so as to cause him to lose his hold and fall, being thereby injured.

In the case of *Johnson v. Chicago, St. Paul, M. & O. Ry. Co.*, 116 Iowa, 639, 88 N. W. 811, the court said:

"The brakeman, in the line of his duty, could lawfully expel the plaintiff as a trespasser upon the train; but if he discharged that duty with excessive force or violence, or at such time or in such manner as to unreasonably imperil the life and limb of the trespasser, then he was negligent as charged, and his employer is liable. Of the authorities cited by the appellee, one only can fairly be said to give color to the doctrine advanced by counsel. It appears that this action was originally pending in the federal court, and there, after a ruling that plaintiff had failed to make a case, he was allowed to dismiss. See (C. C.) 94 Fed. 437. In the opinion there rendered, Shiras, J., recognizes the principle to which we have already referred, saying: 'A trespasser is not necessarily placed without the pale of the law, and he may recover for injury willfully or recklessly inflicted upon him. Thus it is well established that a railway company cannot be justified in evicting a person from its train when the same is in such rapid motion as to necessarily cause risk to the life or limb of the person evicted, even though he is a trespasser. The high regard which the law places upon the life and limb of a citizen compels the company to exercise its right to evict a trespasser in such manner as not to incur the charge of wilful or reckless disregard of the safety of the person evicted.' Applying the rule thus clearly stated to the facts of the case, the federal court held that plaintiff did not come within its terms, because 'he voluntarily engaged in a running contest with the brakeman, in which plaintiff was unlawfully endeavoring to force himself upon defendant's train, and defendant was lawfully endeavoring to prevent the trespass.' From this language we must conclude that the testimony before that court was less favorable to plaintiff than is shown in the record before this court. As it is here presented, it cannot be fairly said that the brakeman was simply 'endeavoring to prevent a trespass.' The trespass was accomplished. The plaintiff was already on the car before he was assaulted by the brakeman. The brakeman's act was not an act of prevention or defense against an intending trespasser, but was an act of eviction, and this comes squarely within the principle affirmed by Judge Shiras. Reference is also made to *Bolin v. Railroad Co.* [108 Wis. 333] 84 N. W. 446, 81 Am. St. Rep. 911. In this case the conductor ordered a certain trespasser to leave the train while in motion, and in making such exit the trespasser was killed. In exonerating the railroad company from liability, the court there says: 'He (the conductor) did not touch the deceased, nor threaten violence to him, nor do anything

reasonably indicating that he was about to physically compel deceased to cease the trespass, and to accept imminent danger of personal injury in doing so'—a statement which renders that decision valueless as a precedent in the case before us. In another place the same authority concedes the validity of the rule which we apply in this case, saying: 'The doctrine that human life cannot willfully be seriously imperiled to prevent or end a mere trespass upon property must not be invaded by the courts.' However leniently men generally may be disposed to look upon physical punishment administered to a persistent trespasser, the law cannot safely countenance such action; nor can even a just indignation against the perpetrator of a petty wrong be permitted to justify an assault which seriously imperils the life of the person of the wrongdoer. This is neither 'false humanity' nor 'maudlin sentiment,' as counsel suggest, but it is one of the indispensable principles which make up the barrier which Christian civilization has erected between law and lawlessness.

"2. Appellee further urges that, plaintiff being a trespasser upon the train, he was therefore guilty of contributory negligence, and without remedy. The proposition is unsound. Being a trespasser, the company owed him no duty to provide him safe transportation, or to protect him against want of ordinary care on the part of its employees; but it was still under the obligation, which we have already mentioned, not to evict him with unnecessary violence, nor to deliberately expose him to unreasonable hazard of injury. If the plea of contributory negligence were to be held good in such case, it would be equally effective if the brakeman, instead of kicking the plaintiff from the ladder, had made use of a loaded revolver.

"3. Neither can it be said that, because plaintiff's act in boarding a moving train was in violation of the statute, such wrong upon his part affords a defense to the claim in suit. The fact that plaintiff's trespass was also a misdemeanor did not change the relations of the parties, nor absolve the defendant's trainmen from their obligation to observe the rules of law we have hereinbefore cited."

In the case of Galveston, H. & S. A. Ry. Co. v. Zantzinger et al., 92 Tex. 365, 48 S. W. 563, 44 L. R. A. 553, 71 Am. St. Rep. 859, the Supreme Court of that state, speaking through Mr. Chief Justice Gains, said: "The questions certified are as follows: First. Should the act of the engineer in throwing out the steam and water for the purpose of ejecting Campbell from the engine be deemed willful, in its relation to the result which actually followed, but was not intended, so that the negligence of Campbell in placing himself in such a position, without which he would not have received his injury, cannot be considered contributory negligence, or should such act of the engineer be re-

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garded as only a negligent cause of such injuries, with which the negligence of Campbell may be considered as contributing to the result? Second. Should the court, in applying the facts of this case as above stated the rule announced in *Railway Co. v. Neff*, 87 Tex. 303, 28 S. W. 283, have assumed that Campbell's act in making the leap described was not contributory negligence, and that he was excused by the act of the engineer and the other facts of the situation from the exercise of ordinary prudence, or should it have submitted to the jury the question of the adequacy of such facts to produce a state of mind in which ordinary prudence should not be expected of him, and the further question whether or not such state of mind was produced?' * * * If the servants of the appellant company purposely threw the hot water upon Campbell, it was an intentional, and not a negligent, wrong. The fact that he was a trespasser upon the train did not justify the engineer's conduct. The latter had the right to remove him, and for that purpose to put his hands upon him, and to use such force as was necessary to accomplish that end. But the means adopted resulted in an assault. * * * When the negligence of the plaintiff concurs with that of the defendant, and contributes to produce the damage for which he sues, he cannot recover. It is not so if the act of the defendant be willful. In speaking of the rule of contributory negligence, the Supreme Court of Indiana say: 'The doctrine, however, can have no application to the case of an intentional and unlawful assault and battery, for the reason that the person thus assaulted is under no obligation to exercise any care to avoid the same, by retreating or otherwise, and for the further reason that his want of care can in no just sense be said to contribute to the injury inflicted upon him by such assault and battery.' * * * The question under consideration, however, involves rather an inquiry as to the duty of a party who has been injured by the fault of another to use reasonable precautions to avoid the consequences of his injury. 1 Sedg. Dam. § 202. In negligence cases such duty is usually regarded as a part of the law of contributory negligence. The rule is that if a plaintiff, who has been injured by the negligent conduct of the defendant, fails to exercise reasonable care to avoid the consequences of his injury, he cannot recover for so much of his damage as results from that failure. But does this rule apply to the case of a willful injury? We are of opinion that it does not. Since one who has committed an assault and battery upon another cannot urge in his defense that the plaintiff might by the use of due care have avoided the battery, we think where the injury is intentional he should not be permitted to say, in reduction of the damages, that the plaintiff might have prevented them, at least in part, by careful conduct on his part. If negligence contributing to the injury cannot be set out to defeat the action when the act of the defendant

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was willful, by a parity of reasoning the defendant in such a case should not be permitted to say that, but for the negligence of the plaintiff in failing to avoid the consequences of the wrong, he would have suffered no damage, or only a part of the damages for which he claims a recovery. We apprehend that a plaintiff cannot make a case by intentionally contributing to the injury which the defendant willfully intends to inflict upon him. For example, should one intentionally hurl a missile at another, with the intent to injure, and should the other voluntarily place himself in its way, and thereby receive a battery which he would otherwise have escaped, the person so struck could not recover. So, when he has been intentionally injured, he should not be permitted to recover damages which might have resulted from his willful omission to take reasonable precautions to avoid the consequences of the wrong. Since a negligent act of the plaintiff, contributing to a result brought about by the concurring negligent act of the defendant, exonerates the defendant from the consequences of his wrong—pro tanto, at least—so a willful act of the plaintiff should have a like effect in case of an intentional injury. *Loker v. Damon*, 17 Pick. [Mass.] 284." See, also, *Galveston, H. & S. A. Ry. Co. v. Zanzinger et al.* (Tex. Civ. App.) 49 S. W. 677; *Chicago, Milwaukee & St. Paul Ry. Co. v. Doherty*, 53 Ill. App. 282; *Ill. Cent. Ry. Co. v. West*, 60 S. W. 290, 22 Ky. Law Rep. 1387; *Carter v. Louisville, New Albany & Chicago R. Co.*, 98 Ind. 552, 49 Am. Rep. 780; *Hewitt v. Swift*, 3 Allen (Mass.) 420; *Pittsburg, etc., Ry. Co. v. Caldwell*, 74 Pa. 421; *Shea v. Sixth Ave. Ry. Co.*, 62 N. Y. 180, 20 Am. Rep. 480; *Lovett v. Salem, etc., Ry. Co.*, 9 Allen (Mass.) 557; *Hoffman v. New York Central, etc., Ry. Co.*, 87 N. Y. 25, 41 Am. Rep. 337; *West Jersey S. & R. Co. v. Welsh*, 62 N. J. Law, 655, 42 Atl. 736, 72 Am. St. Rep. 659; *Benton v. Chicago, etc., Ry. Co.*, 55 Iowa, 496, 8 N. W. 330; *Johnson v. Chicago, etc., R. Co.*, 55 Iowa, 707 8 N. W. 664.

Without passing upon the question as to plaintiff's being entitled to re-enter the car we hold that he was entitled to have submitted under proper instructions the issue as to whether, whilst in a dangerous position, defendant's brakeman willfully and unnecessarily and wantonly kicked him and caused him to fall from a moving train, thereby sustaining injury.

The judgment of the lower court is reversed, with instructions to grant a new trial. All the Justices concur, except HAYES, J., absent and not participating.

ST. LOUIS, I. M. & S. RY. CO. *v.* HUDSON.

(Supreme Court of Arkansas, June 27, 1910.)

[130 S. W. Rep. 534.]

False Imprisonment—Arrests by Conductor—Carrier's Liability.*—Act March 2, 1909 (Acts 1909, p. 100) § 3, authorizing railway conductors to arrest intoxicated persons on their trains, does not make a conductor an absolute judge of a passenger's condition as to intoxication, and a carrier is liable for an arrest made by its conductor, if he did not act in good faith and with ordinary care.

False Imprisonment—Arrests by Conductors—Good Faith—Burden of Proof.*—Under Act March 2, 1909 (Acts 1909, p. 100) § 3, authorizing railway conductors to arrest intoxicated persons on their trains, where a passenger shows that he was not intoxicated when arrested, the company, to avoid liability for injury resulting proximately from the arrest, must show that the conductor acted in good faith and used ordinary care.

False Imprisonment—Arrest by Conductor—Good Faith—Jury Question.—Under Act March 2, 1909 (Acts 1909, p. 100) § 3, authorizing railway conductors to arrest intoxicated persons on their trains, in a suit against a carrier for an arrest, whether or not the passenger was intoxicated, and whether the conductor acted with ordinary care and in good faith, are questions for the jury, under appropriate instructions.

False Imprisonment—Arrest by Conductor—Instructions—Good Faith.—In a suit against a carrier for an arrest made by its conductor, an instruction that, though the conductor was judge as to whether plaintiff was intoxicated, if he was mistaken the company would be liable, was erroneous, as ignoring the question whether the conductor acted in good faith.

Trial—Conflicting Instructions.—Conflicting instructions are improper.

Trial—Instructions—Assumption of Facts.—An instruction that, in assessing plaintiff's damages, on finding for him the jury might consider any injuries inflicted upon him, the pain incident thereto, and his humiliation, was not improper, as assuming facts.

Appeal and Error—Harmless Error—Instructions—Uncontroverted Facts.—Error in an instruction in assuming uncontroverted facts is harmless.

*For the authorities in this series on the question whether railroad companies are liable on account of arrests or prosecutions made or instigated by their employees or agents, see foot-note of *McKain v. Baltimore & O. R. Co.* (W. Va.), 32 R. R. R. 542, 55 Am. & Eng. R. Cas., N. S., 542; foot-note of *Chicago, etc., Ry. Co. v. Nelson* (Ark.), 31 R. R. R. 785, 54 Am. & Eng. R. Cas., N. S., 785.

St. Louis, etc., Ry. Co. v Hudson

Appeal from Circuit Court, Cleburne County; Brice B. Hudgins, Judge.

Action by William Hudson against the St. Louis, Iron Mountain & Southern Railway Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Instructions 3 and 13 requested by defendant and referred to in the opinion read as follows: "3. If you find from the evidence that at the time plaintiff presented himself at the train of defendant in Little Rock for the purpose of taking passage thereon that he appeared to be under the influence of intoxicants or was intoxicated, or if the conductor or agent and employees of defendant in charge of said train honestly and in good faith believed that he was drunk or intoxicated and for that reason refused to permit him to enter said train, then he cannot recover and your verdict must be for the defendant, unless you further find that such discretion was abused, or unwarranted means used in preventing him to enter the train.

"13. If you find from the evidence that the conductor in charge of defendant's train honestly and in good faith believed from plaintiff's appearance and from the smell of liquor on plaintiff's breath that plaintiff was drunk or intoxicated when he presented himself for passage upon defendant's train and that on account of said condition the conductor refused to accept plaintiff as a passenger and used no more force than was necessary to prevent plaintiff from entering upon said train, then plaintiff cannot recover and your verdict should be for the defendant."

The appellee brought this suit against appellant to recover damages alleged to have been sustained by appellee in being refused admission as a passenger on, and in being ejected from, one of the appellant's trains while in the act of boarding same at Little Rock, Ark., for the purpose of taking passage to Batesville, Ark. There was a jury trial, and a verdict and judgment in favor of appellee for \$700.

The evidence on behalf of appellee tended to show that he, in company with two other parties, one of whom had purchased a ticket for appellee, attempted to get on one of appellant's trains at the depot in Little Rock, for the purpose of going to Batesville; that the officials in charge of the train refused to permit appellee to board the train, stating to him at the time that he was drunk; that appellee, notwithstanding such refusal, when the train going to Batesville began to move, attempted to board same; that the conductor shoved or threw him from the steps to the ground; that in the fall his leg was injured in the same part where it had been fractured some three years before; that the injury was severe and very painful; that the appellee had been a cripple, one limb being shorter than the other; that in consequence he limped; that as soon as he was ejected from the train a police-

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man arrested him, having been requested to do so by the one who ejected him from the train; that the policeman dragged him to the baggageroom, and from there he was taken to police headquarters, and thence to jail.

The testimony on behalf of appellant tended to show that appellee, when he attempted to board appellant's train, was drunk; that because of that fact the conductor refused to permit him to board the train; that on being refused appellee became boisterous and profane, and that for this cause the policeman arrested him, and took him before the police court on a charge of breach of the peace; that appellee was not injured or hurt in any manner by the act of the conductor in refusing him admission to the train.

Lovick P. Miles and Thos. B. Pryor, for appellant.

WOOD, J. (after stating the facts as above). First. Section 3 of the act of March 2, 1909 (Acts 1909, p. 100) provides as follows: "All conductors on trains running in this state are hereby authorized and empowered to act in the capacity of peace officers on their respective trains in this state for the specific purpose only to arrest any and all persons on their respective trains that they find to be drunk or in an intoxicated condition, and deliver said person or persons together with the names of two witnesses who are not railroad employees, to some peace officer at the first available opportunity, and said conductor is hereby authorized and empowered to deputize any person or persons present to assist him in the performance of said duty."

The appellant contends that the act "makes the conductor the absolute judge of the passenger's condition with reference to being drunk on any train in this state." That is not a correct construction of the statute. The conductor, in the discharge of his duty under this statute, must not act arbitrarily, and without due care. While the company, under this statute, could not be held liable for the conduct of the conductor in making the arrest of any person so long as such conductor was acting in good faith and with ordinary care, yet the company would be liable if the conductor in arresting any person did not exercise ordinary care to ascertain whether such person was drunk, or did not act in good faith, i. e., with the honest purpose to discharge his duty under the circumstances.

Where one arrested by the conductor of a railway train shows that he was not drunk when he was arrested, the company, in order to escape liability for any damages that resulted proximately from such arrest, would have to show that its conductor acted in good faith in making such arrest, i. e., that he honestly believed, after the exercise of ordinary care under the circumstances of the arrest, that the party arrested was drunk. The company would not be liable for the arrest, where the party ar-

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rested was sober, if the conductor exercising ordinary care, honestly believed, under all the facts and circumstances, that the party arrested was drunk, and made the arrest and the ejection without any unnecessary force. Whether or not the party arrested was drunk at the time of the arrest, and whether the conductor in making the arrest acted with ordinary care, and whether he honestly believed at the time of the arrest that the party arrested was drunk, and whether he used only such force as was necessary, are all questions of fact to be submitted to the jury under appropriate instructions.

Second. Appellant contends that the court erred in giving appellee's prayer No. 8 as follows: "8. Although you are instructed that the conductor would be the judge as to whether the plaintiff was drunk, yet, if the conductor erred in his judgment, the defendant would be answerable and liable for any injuries that resulted therefrom." The instruction was erroneous. It does not conform to the statute as we have construed it. Under this instruction the appellant would be liable for any mistake of its conductor in making the arrest, no matter if he acted in good faith and with ordinary care. True, in other instructions given at the request of appellant the jury were told that if the conductor "honestly and in good faith believed that appellee was drunk," and for that reason "refused to permit him to enter the train," etc., that appellee could not recover. But these latter instructions were in conflict with instruction No. 8, *supra*. The attention of the court was specifically directed to the error in instruction No. 8, by instructions numbered 3 and 13, given at appellant's request. The jury under the conflicting instructions would not know which were correct, and would be without any sure guide. Conflicting instructions should not be given. *Anthracite Coal Co. v. Bowen and Thrasher* (— Ark. —) 124 S. W. 1048, and cases cited. See, also, *St. L., I. M. & S. Ry. Co. v. Clyde Rogers* (— Ark. —) 126 S. W. 375.

The court gave, over appellant's objection, the following instruction: "You are instructed if you find for plaintiff that it will be your duty to assess his damages, and that in doing so you may take into consideration any injuries inflicted upon the plaintiff, the pain and suffering incident thereto, his humiliation and mortification, and assess his damages at such a sum as in your judgment you may find from the testimony would compensate him for the injuries done, pain, suffering, and humiliation." There was no error in the giving of this instruction. By it the jury were left to determine from the testimony what damage appellee had suffered from the injuries done, pain, suffering, and humiliation. The instruction did not assume the facts. But there was no conflict in the evidence as to appellee having been injured, nor that he suffered pain, and was ejected under circumstances that were humiliating. Therefore, even if

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the instruction assumed these as uncontroverted facts, it was nevertheless not prejudicial.

The other error of which appellant complains as to the manner of interrogating witnesses and the remarks of counsel will not likely arise in the next trial, and we will therefore not discuss them.

For the error in giving instruction No. 8 as indicated, the judgment must be reversed and the cause remanded for new trial.

ARKANSAS MIDLAND RY. CO v. ROBINSON.

(Supreme Court of Arkansas, June 27, 1910.)

[130 S. W. Rep. 536.]

Carriers—Station Grounds—Duty to Keep in Repair.*—A railroad must exercise ordinary care to keep in safe condition all portions of its platforms and approaches thereto to which the public will naturally resort, and all portions of its station grounds reasonably near the platform where passengers go to board or leave trains.

Carriers — Depot Platforms — Negligence — Question for Jury.—Whether a railroad was guilty of negligence in failing to keep a platform at a depot, used by the public to board trains, in a reasonably safe condition held, under the evidence, for the jury.

Carriers—Defective Platforms—Injuries to Passengers—Contributory Negligence—In an action for injuries to a passenger on a defective platform used while attempting to board a train, evidence held to justify a finding of freedom from contributory negligence.

Appeal and Error—Harmless Error—Erroneous Exclusion of Evidence.—Where, in an action for injuries to a passenger on a depot platform the court admitted evidence that no one had fallen from the platform at the point of the accident, the error, if any, in sustaining an objection to a question as to whether the platform had proved reasonably safe for passengers going to and from trains was not prejudicial.

Damages—Personal Injuries—Mental Pain and Anguish.†—Mental pain and anguish sustained by a person falling down steps, so as to cause her to remain unconscious for about 10 hours, are inseparable from the physical suffering, and damages therefor are properly allowed.

*See second head-note of *Missouri Pac. Ry. Co. v. Irvin* (Kan.), 35 R. R. R. 187, 58 Am. & Eng. R. Cas., N. S., 187; first head-note of *Moriarty v. Boston & M. R. R.* (Mass.), 34 R. R. R. 227, 57 Am. & Eng. R. Cas., N. S., 227.

†For the authorities in this series on the subject of the right to recover for mental suffering, see foot-note of *St. Louis, etc., Ry. Co. v. Buckner* (Ark.), 33 R. R. R. 780, 56 Am. & Eng. R. Cas., N. S., 780; last head-note of *Norris v. Southern Ry.* (S. Car.), 33 R. R. R. 208, 56 Am. & Eng. R. Cas., N. S., 208.

Arkansas Midland Ry. Co. v. Robinson

Appeal from Circuit Court, Monroe County; Eugene Lankford, Judge.

Action by Lila E. Robinson against the Arkansas Midland Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Lila E. Robinson brought suit against the Arkansas Midland Railway to recover damages on account of the alleged negligence of said railway company in failing to provide a safe platform for its passengers. The railway company answered her complaint and denied the alleged ground of negligence and alleged contributory negligence on her part. On the 26th day of August, 1909, Lila E. Robinson went to the depot at the Arkansas Midland Railway for the purpose of taking passage on one of its trains. The distance from the depot platform to the passenger coach, which she wished to enter, was such that she could not step from the platform to the coach with safety. The most practical route to the coach was by the steps on the side of the platform to the ground and from there to the train. As she placed her right foot on the first step in her descent from the platform she began to stumble, and fell down the steps. She had a suit case in one hand and a box in the other. She did not remember what caused her to stumble and fall. The fall rendered her unconscious, and she remained in that condition for about 10 hours. She required the services of a physician for 5 or 6 days after she received the injury. She suffered severe pains, chiefly from her head and from her hips, and still continued to suffer pain after the physician had dismissed her case. Her foot was 9 inches long. The height of her shoe heel was $2\frac{1}{4}$ inches and they were about $1\frac{1}{4}$ inches lengthwise. She was right up at the top step, where the platform and the top step join when she began to fall. The top of the platform at that point is about $4\frac{1}{2}$ feet from the ground. Its approach was by open steps, 8 in number. The top step extends back up under the end of the planks of the platform. It is only about 8 inches out beyond the platform and about 3 or 4 inches below it. Just before the top step is reached, there is a hole in the platform about $10\frac{1}{2}$ inches long and about $1\frac{1}{2}$ inches wide. Wash Harris, an old negro, who was near and saw the accident, described it as follows: "Q. State her movement as well as you can, just before and about the time she fell. A. She had got to the step, and she placed her right foot on the first top step, and then right from that she began to fall, with a curious kind of twisting move, and I says, 'Man, that lady is going to get a fall.' then by this time she had begun to fall and by the time she hit the second or third step she made to catch with her left hand and her suit case fell off. Q. Where was her left foot. A. Her left foot was coming, dragging along behind. Q. What

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was right there under her left foot at that place? A. There was a hole in the floor right there. Q. Her left foot was about that portion of the platform, where she began to fall? A. Yes, sir. Q. And then she put her right foot on the top step? A. Yes, sir. Q. Then she fell onto the concrete walk, did she? A. Yes, sir." The case was tried before a jury, which returned a verdict in favor of the plaintiff for \$2,000. From the judgment rendered, the defendant has appealed to this court.

W. E. Hemingway, E. B. Kinsworthy, and Jas. H. Stevenson,
for appellant.

H. A. Parker, for appellee.

HART, J. (after stating the facts as above). 1. It is insisted by counsel for appellant that the evidence is not sufficient to support the verdict. "As a general rule, railroad companies are bound to keep in safe condition all portions of their platforms and approaches thereto, to which the public do, or would naturally, resort, and all portions of their station grounds reasonably near to the platform, where passengers, or those who have purchased tickets with a view to take passage on the cars, or to debark from them, would naturally or ordinarily be likely to go: and especially by those routes and methods which the company have established by its own customs and practice, as here. This is well established." *Texas & St. Louis Railway v. Orr*, Adm'r, 46 Ark. 182, and cases cited at page 195. Hence it will be seen that it is the duty of the railway company to exercise ordinary care to keep its platform in a safe condition for the use of its passengers and others who have a right to go there. Tested by this rule, it cannot be said, as a matter of law, under the facts and circumstances adduced in evidence in this case, that the appellant company was not guilty of negligence, or that appellee was guilty of contributory negligence.

Appellee was on appellant's depot platform for the purpose of going to one of its trains, which carried passengers and of taking passage thereon. It is undisputed that there was a hole in the platform at the place where she began to fall. The negro, Wash Harris, says that he was looking at her as she walked along: that, as she placed her right foot on the top step, she began to fall "with a curious kind of twisting move;" that at the time her left foot was on the platform, and there was a hole in the platform there. Other evidence shows that the hole was sufficiently large for the heel of her shoe to have become caught, or to have turned in it, that her foot was 9 inches long, and that the top step extended only 8 inches out beyond the platform, and was only 3½ or 4 inches below it. Under these facts and circumstances, reasonable men might have inferred that her left heel become fastened in the hole in the platform, or that stepping

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in the hole caused her foot to turn as she was in the act of stepping off of the platform; that the movement of her body being forward and downward, when her foot got caught or turned, caused the "curious twisting" movement described by Harris, and that the swaying of her body caused her to lose her balance and to fall headlong to the bottom of the steps. It is true that she states that she does not remember what caused her to fall, but she also states that she was fairly active, and that she was not subject to fainting spells. When we remember that the force of the fall was so great that she fell headlong to the bottom of the steps, it is not unreasonable that the jury might have found that the injury was received in the way we have described; and that the fact that it happened so quickly and unexpectedly, and that appellee was unconscious for 10 hours afterwards, may have prevented her from remembering that her foot was caught. The jury was, also, warranted in finding that appellee was not guilty of contributory negligence; for the hole was not so large that she in the exercise of ordinary care must have seen it while walking along the platform.

2. It is next contended by counsel for appellant that the court erred in refusing to permit the witness Lusk, who was the station agent, to answer the following question: "Has this platform and steps proven reasonably safe for passengers coming to and from the train?" The ruling of the court resulted in no prejudice to appellant conceding that the witness would have answered in the affirmative, and that the answer would have been competent evidence, the court immediately permitted the witness to state that no one else had fallen from the platform at that point during the time he had been station agent. This was practically an answer, in another form, to the question, and had as much probative force as would have resulted from an affirmative answer to the question objected to.

3. It is also contended that the court erred because it told the jury in assessing the damages sustained by appellee to take into consideration the mental pain and anguish suffered by her. Under the facts and circumstances adduced in evidence, the mental pain was inseparable from the physical suffering of appellee. This question was determined adversely to the contention of appellant in the case of *Arkansas Southwestern R. Co. v. Wingfield*, 126 S. W. 76.

No other assignments of error are urged for reversal, and the judgment will be affirmed.

CAYWOOD *v.* SEATTLE ELECTRIC CO.

(Supreme Court of Washington, Aug. 8, 1910.)

[110 Pac. Rep. 420.]

Trial—Instructions—Assumption of Facts.—An instruction that “if you find” there was continuous snow the day of the accident, etc., does not assume that a snowstorm was prevailing on such day.

Trial—Instructions—Withdrawing Issues—Instructions as a Whole.—That an instruction: “You must find one thing * * * before you return a verdict against the company * * * ‘was said car stopped or operated in such a way as to cause a sudden jerk, and through that sudden jerk was plaintiff thrown to the ground?’ and on that one matter the court is going to submit to you * * * a special finding”—had not for its purpose the withdrawing of other issues of negligence, is made clear by their being submitted to the determination of the jury in other clear instructions.

Carriers—Injury to Passenger—Contributory Negligence—Excusing Conduct.*—That a passenger, on an electric street car may excuse his going to the entrance and starting down the steps while the car was still running at a high speed, under the custom of the company to approach a place at which a passenger desires to alight at such a high speed as to carry him beyond it unless he gets out of his seat and takes a position at the entrance or on the steps, he must show that the necessity therefor, to attract the attention of the conductor existed, or that he had the right to think it did, in the particular case, which he does not do where he testifies that before he left the inclosed part of the car the conductor recognized his indicated desire to get off at the next station, and had signaled the motorman to that effect.

Carriers—Injury to Passenger—Negligence—Snow on Street Car Steps.†—That snow and ice had accumulated on the steps of a street car by being brought in on the feet of passengers between the time a passenger boarded it and slipped in getting off it is not evidence of negligence.

Trial—Taking Issues from Jury.—Taking from the jury issues of negligence, as to which there is no evidence justifying a recovery, is not error.

Department 1. Appeal from Superior Court, King County; Wilson R. Gay, Judge.

Action by R. W. Caywood against the Seattle Electric Company. Judgment for defendant. Plaintiff appeals. Affirmed.

*See last foot-note of *Heinze v. Interurban Ry. Co.* (Iowa), 30 R. R. R. 330, 53 Am. & Eng. R. Cas., N. S., 330.

†See foot-note of *Riley v. Rhode Island Co.* (R. I.), 30 R. R. R. 129, 53 Am. & Eng. R. Cas., N. S., 129.

Caywood v. Seattle Electric Co

Reynolds, Ballinger & Hutson, for appellant.

James B. Howe and A. J. Falknor, for respondent.

FULLERTON, J. The respondent owns and operates an electric street railway in the city of Seattle. The appellant, while a passenger on one of the respondent's cars, fell therefrom, and received severe and permanent injuries. The appellant conceived that his fall was due to the negligent manner in which the car was operated, and brought the present action to recover for his injuries. As ground of negligence he alleged that it was the custom of the street car company to approach the place at which he desired to alight at such a high rate of speed as to carry passengers beyond it, unless such passengers got out of their seats and took a position in either the space provided in the car for entering and leaving it or on the steps of the car and that it had become a custom for passengers desiring to alight at the particular station to take one of such positions; further alleging that such custom was reasonably safe when the cars were operated at an ordinary and reasonable rate of speed, and was commonly indulged in by persons of ordinary prudence. He then alleged that the car on which he was riding at the time he received his injuries approached the station in question at a high rate of speed, and that he, "for the purpose of alighting from said car, signaled the conductor to stop said car at said station, and, mindful of said custom and because thereof, went back to the entrance of said car to await its arrival at said station, and, when said car had reached a point about 150 feet from said station, plaintiff started to go down upon the steps of said car for the purpose of alighting when the same should stop; that plaintiff was holding firmly to an iron stanchion or pipe dividing said space with his left hand and was observing due and proper care and caution for his own safety and was without negligence in the premises, and suddenly, and without warning to plaintiff and at the moment plaintiff started to go down said steps to be in a position to alight from said car when the same should stop, the motorman in charge of said car and of the running and stopping of said car checked the speed of said car with unnecessary suddenness, causing the same to give a violent, sudden, and unnecessary jerk, and suddenly and unnecessarily reducing the speed of said car from the very high rate at which it had been going to a very low rate of speed, thereby, and by reason of the slippery condition of said entrance to said car and of said steps and the extra hazard caused by said defendant compelling passengers to be at the entrance of said car while in motion in order to alight from said car at said station, plaintiff was violently thrown to the ground by the side of said track; that said ground was frozen, and plaintiff struck upon it upon his head and arm and right knee, thereby receiving the injuries hereinafter set forth; that

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said throwing of plaintiff to the ground was in no manner due to any negligence upon his part, but was wholly due to the carelessness and negligence of defendant and its agents and servants in permitting snow and ice to accumulate upon said entrance and steps of said car, and in suddenly checking the speed of said car with unnecessary violence and with an unnecessary jerk, and in compelling passengers desiring to alight at said station to be at the entrance to said car or upon said steps while said car was in motion." Issue was taken on the allegations of the complaint and a trial had which resulted in a verdict for the respondent, and a special verdict to the effect that there was no sudden checking of the speed of the car, no violent, sudden or unnecessary jerk given the car, after the appellant got down onto the car steps for the purpose of alighting. Judgment was entered on the verdict, and this appeal was taken therefrom.

The errors assigned are predicated upon the instructions of the court to the jury. The following were given to which the appellant excepted: "In this action I charge you that, if you find that there was continuous snow and freezing weather during the day of the accident, the plaintiff would have no right to assume that the evidence of snowstorm would be immediately and effectually removed from the exposed portion of the steps and the entrance to the street car upon which he was riding; that the prevalence of such weather would impose upon the plaintiff such extra care to look out for his safety as an ordinarily prudent and careful person would exercise under like circumstances, and, if he failed to exercise such care and was injured through such failure, then he is not entitled to recover. In other words, gentlemen of the jury, you must find one thing in this case before you can return a verdict against the company, and that one thing that you have to find is, 'was said car stopped or operated in such a way as to cause a sudden jerk, and through that sudden jerk was plaintiff thrown to the ground?' and on that one matter the court is going to submit to you, at the request of the respondent company, a special finding." It is objected that the first instruction is misleading because based upon the assumption that a snowstorm was prevailing upon the day of the accident, whereas in fact no such storm was then prevailing. The witness, an observer at the United States Weather Bureau, at the page in the record cited by counsel to show the absence of a snowstorm on the day in question, testified as follows: "The record shows that the dry snow began at 630 o'clock in the morning and continued until 6 o'clock in the evening. And the total precipitation melted from the snow for the day was eight-hundredths of an inch. At 5 o'clock in the evening there was one inch of snow on the ground. At noon a special observation was taken; and up to that time the amount of precipitation melted from the snowfall was six-hundredths of an inch. The day was cloudy and cold.

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The highest temperature reached during the day was 22 degrees, and the lowest temperature was 18 degrees." It would seem that this would meet the objection made by counsel even had the court assumed the prevalence of such a storm. But an examination of the instruction will show that the learned trial judge made no such assumption. On the contrary, he left it for the jury to find whether or not there was "continuous snow and freezing weather during the day of the accident," instructing them to apply the rule of law given only in case they found the fact to exist. The record justified the instruction, and we find no error therein.

To the second quoted instruction it is objected that it took from the jury the questions of negligence arising from the fact that passengers desiring to alight at this station were compelled to arise and go to the entrance way and steps of the car in order to prevent being carried beyond it, and the fact that snow and ice had been permitted to accumulate on the steps and in entrance way to the car at the time of the injury. We think, however, there was no error here. That it was not the purpose of the court to withdraw these questions from the jury is made clear by the fact that it submitted the very questions to their determination in other instructions in which the point for decision was stated with such accuracy as to meet with the approval of both sides.

But, if it can be said there is a possibility that the jury were led to believe that their right to consider these questions depended upon the view they took of the question specially submitted, we still find no ground for reversing the judgment. It is made clear by the evidence that the appellant was not compelled to resort to the alleged custom in order to attract the attention of the conductor on this particular occasion. On the contrary, he himself testifies that the conductor had recognized his indicated desire to get off at the station to which the car was approaching, and had signaled the motorman to that effect before he had left the inclosed part of the car. He testified, further, that, notwithstanding he had knowledge of the fact that a signal to stop had been given and that the car was running at a high rate of speed, he proceeded on his way to the entrance, and started to go down the steps before he fell from the car. Under these circumstances, he cannot justify his act of leaving his seat and going to the entrance of the car by the fact that it was sometimes necessary for passengers so to do in order to attract the attention of the conductor. He must show that the necessity existed, or that he had the right to think it existed, in the particular case before he can avail himself of the custom.

With reference to the other question, it was testified by the appellant and by one of his witnesses that snow and ice existed on the steps of the car and in the entrance way of the same at

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the time the appellant fell therefrom, but whether much or little was not stated. Nor was there any evidence tending to show that it had existed there for any considerable length of time. On the contrary, the evidence that does touch the question is the other way. The appellant himself testified that, when he boarded the car in the downtown district, he saw no snow nor ice either on the steps of the car, or in entrance way, and thinks there was none. Such snow and ice as had accumulated in these places therefore must have accumulated during the passage of the car from the place where the appellant boarded it to the place where he fell therefrom, and, as but a trace of snow fell during that trip, the ice and snow must have been brought in by the feet of the passengers who boarded the car between those points. But the fact that some snow and ice may have accumulated by this means is not evidence of negligence on the part of the company. It is not practicable to prevent such a condition when there is snow falling or there is snow upon the ground. As was said in the case of *Riley v. Rhode Island Co.*, 29 R. I. 143, 69 Atl. 338, 11 L. R. A. (N. S.) 523: "In the case at bar we think it would be unreasonable to hold that it was the duty of the defendant corporation to prevent the step from becoming slippery by the ingress of passengers during the passage of the car along its route. In a climate such as ours the effectual performance of such a duty would at times cause serious inconvenience to the traveling public, and during the continuance of a storm would be impossible. The prevalence of stormy weather and a freezing temperature imposes upon a passenger an extra degree of care, which he cannot expect the carrier to save him from. He must bear his share of the burden of 'the inconstant year.'" There was therefore no evidence in the record justifying a recovery on these branches of the case considered as independent grounds of negligence, and hence there was no error on the part of the court in taking them from the jury even were it conclusive that the instruction complained of had that effect.

The judgment is affirmed.

RUDKIN, C. J., and GOSE, MORRIS, and CHADWICK, JJ., concur.

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Bill of lading as a contract can not be varied by parol evidence. *Alabama, etc., R. Co. v. Norris (Ala.)*, 446.

Bill of lading is of a dual character and effect, one is that of a receipt, and the other is that of a contract. *Alabama, etc., R. Co. v. Norris (Ala.)*, 446.

Consignee, where the goods were never received by him or any of the carriers, could recover from the terminal carrier the amount of the draft accompanying the bill of lading, which he had paid, since there was a joint liability on the part of all the railroad companies, the bill of lading having been issued by an agent employed by them jointly to solicit freight; and it was immaterial whether the bill of lading was negotiable or not. *Dulaney & Wharton v. Philadelphia, etc., Ry. Co. (Pa.)*, 740.

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Duty of shipper to minimize damages caused by escape of his cattle from pens while awaiting cars rendered contract having for its sole inducement the undertaking of shipper to collect and ship all of the escaped cattle he could find one without consideration. *St. Louis, etc., Ry. Co. v. Jones (Ark.)*, 212.

Degree of Care.

Carrier is an insurer against all loss or damage which is not caused by acts of God or the public enemy or the propensities or nature of the animals, against which due care could not provide. *Atlantic C. L. R. Co. v. Rice (Ala.)*, 478.

Carrier of live stock accompanied by the shipper is not bound to use the highest degree of care to avoid injury to the stock through freezing, ordinary care being sufficient. *Colsch v. Chicago, etc., Ry. Co. (Iowa)*, 453.

Notice that mares are in foal, whether carrier is chargeable with. *Missouri, etc., Ry. Co. v. Hancock (Okla.)*, 221.

Required of carrier of live stock accompanied by shipper. *Colsch v. Chicago, etc., Ry. Co. (Iowa)*, 455.

Delay.

Carriers must transport live stock with all convenient dispatch, and with such suitable and sufficient means as it must provide for its business. *St. Louis, etc., Ry. Co. v. Jones (Ark.)*, 212.

Damage to stock ordinarily incident to transportation, resulting from being confined in cars and carried contrary to their natural habits, and unavoidable delay, carrier is not liable for. *Wahle v. Great Northern Ry. Co. (Mont.)*, 467.

Under Mont. Rev. Codes, § 5355, a common carrier is liable for delay only when it is caused by its want of ordinary care and diligence. *Wahle v. Great Northern Ry. Co. (Mont.)*, 467.

Duty to Furnish Facilities.

Implied agreement of plaintiffs to use the cars for the shipment constituted a sufficient consideration for carrier's promise to furnish them. *Pope v. Wisconsin Cent. Ry. Co. (Minn.)*, 745.

Evidence.

Carrier, sued for loss through freezing, could show whether the car was overloaded by shipper. *Colsch v. Chicago, etc., Ry. Co. (Iowa)*, 453.

Carrier, sued for loss of stock through freezing, could show that the shipper told a conductor that the loss resulted from overloading, without saying anything about freezing. *Colsch v. Chicago, etc., Ry. Co. (Iowa)*, 453.

Competent live stock shippers, who saw a damaged shipment, could testify whether stock would freeze in such a car at a temperature shown to have existed during the transportation. *Colsch v. Chicago, etc., Ry. Co. (Iowa)*, 453.

Limiting Liability.

Duties of both shipper and carrier under bill of lading by which shipper contracts that he will load and unload stock at his own risk and feed, water, and attend them at his own expense and risk while in the yards awaiting shipment. *Gilliland & Gaffney v. Southern Ry. Co. (S. Car.)*, 4.

Hepburn act does prevent a carrier of cattle from one state to

CARRIERS OF LIVE STOCK—Continued.

- another to exempt itself by contract from liability until the cattle are loaded on its cars. *St. Louis, etc., Ry. Co. v. Jones (Ark.)*, 212.
- Maximum valuation of the live stock designated in the contract, validity of contract providing that carrier's liability shall not exceed the. *Missouri, etc., Ry. Co. v. Hancock (Okla.)*, 221.
- Notice of claim for loss or injury shall be given before removal or intermingling of stock, validity of contract of carriage providing that. *Mobile, etc., R. Co. v. Brownsville Livery & Live Stock Co. (Tex.)*, 714.
- Stipulation that shipper shall assume the risk and care of his cattle until they are loaded does not effect the duty of the carrier to furnish cars within a reasonable time after demand therefor. *St. Louis, etc., Ry. Co. v. Jones (Ark.)*, 212.
- Validity and effect of contract under which shipper assumes all risk and expense of caring for his stock, and agrees to load and unload the same at his own expense. *St. Louis, etc., Ry. Co. v. Jones (Ark.)*, 212.
- Waiver by carrier of notice of claim for damages for injuries before they were unloaded or intermingled with other stock, evidence was sufficient to carry to jury question of. *Gilliland & Gaffney v. Southern Ry. Co. (S. Car.)*, 4.
- Waive stipulation requiring notice in writing of claim for damages for injuries before stock are unloaded and intermingled with other stock by law of Georgia, carrier may. *Gilliland & Gaffney v. Southern Ry. Co. (S. Car.)*, 4.
- What law governs where contract of shipment of stock was made in one state and is to be performed partly in that state and partly in another. *Gilliland & Gaffney v. Southern Ry. Co. (S. Car.)*, 4.

CARRIERS OF PASSENGERS.

See STATIONS AND DEPOTS; TICKETS AND FARES.

Arrests.

Carrier is liable for arrest made by conductor, under statute authorizing conductors to arrest intoxicated persons on trains, if he did not act in good faith and with ordinary care. *St. Louis, etc., Ry. Co. v. Hudson (Ark.)*, 788.

Under statute authorizing conductors to arrest intoxicated passengers on trains, where passenger shows he was not intoxicated, carrier, to avoid liability, must show that conductor acted in good faith and used ordinary care. *St. Louis, etc., Ry. Co. v. Hudson (Ark.)*, 788.

Under statute authorizing conductors to arrest intoxicated passengers on trains, whether the passenger was intoxicated and whether conductor acted with ordinary care and good faith, are questions for jury. *St. Louis, etc., Ry. Co. v. Hudson (Ark.)*, 788.

Assaults.

Act of brakeman in kicking ejected passenger while he was on car steps, attempting to reenter train, was a willful assault, and therefore the act of the passenger, though not entitled to reenter train, in climbing on the steps was not a contributing cause of the injury. *Moore v. Atchison, etc., Ry. Co. (Okla.)*, 776.

Provocation by insulting words does not justify an assault upon a passenger by conductor. *McDade v. Norfolk, etc., Ry. Co. (W. Va.)*, 554.

CARRIERS OF PASSENGERS—Continued.

Railroad was not relieved from liability because an assault upon a passenger was committed by a deputy sheriff called upon by station agent to eject certain undesirable persons, not passengers, from the station. *Whitlock v. Northern Pac. Ry. Co.* (Wash.), 125.

Assumption of increased risk from riding in place not intended for passengers. *Chicago, etc., Ry. Co. v. Thurlow* (C. C. A.), 546.

Assumption of risks by passengers on tops of crowded cars with acquiescence of conductor. *Patterson's Adm'r v. Louisville, etc., R. Co.* (Ky.), 139.

Bridges.

Not error to instruct that if proximate cause of collapse of bridge "might have been" slipping of stringers, and that carrier was negligent in the method adopted in placing the stringers, a passenger injured by reason thereof could recover. *Roanoke Ry. & Elec. Co. v. Sterrett* (Va.), 749.

Burden of Proof.

Burden rested primarily on street car passenger, suing for injuries caused by bridge collapsing under car, to show carrier's negligence, but proof of his injury through such accident was sufficient. *Roanoke Ry. & Elec. Co. v. Sterrett* (Va.), 749.

Conductor's act in receiving and carrying passengers on platforms when train is overcrowded binds company. *Norvell v. Kanawha, etc., Ry. Co.* (W. Va.), 148.

Conductor's act in requesting passenger to go on the platform of car because of the crowded condition of the car is an act done in managing the train. *Central of Georgia Ry. Co. v. Brown* (Ala.), 197.

Contributory Negligence.

Alighting from moving train. *Florida Ry. Co. v. Dorsey* (Fla.), 556.

Liability of carrier where passenger collided with trucks while boarding moving train. *Southern Ry. Co. v. Nichols* (Ga.), 767.

One who attempts to board a moving street car assumes the risk of such attempting to board the car, but not of negligence in increasing its speed. *Orth v. Saginaw Valley Traction Co.* (Mich.), 588.

Passenger assumed risk of injury when standing on platform of vestibuled car merely because inside of car was hot. *Clanton v. Southern Ry. Co.* (Ala.), 120.

Passenger is not guilty of contributory negligence per se in standing in a mixed train. *St. Louis, etc., Ry. Co. v. Hartung* (Ark.), 142.

Proximate cause where passenger was injured while alighting from wrong train while it was moving after the carrier had negligently failed to inform him as to which was the right train. *Chesapeake, etc., Ry. Co. v. Wills* (Va.), 577.

Question for jury whether carrier failed to furnish proper accommodation for passenger inside of car, and made it necessary for him to stand on the platform. *Central of Georgia Ry. Co. v. Brown* (Ala.), 197.

Question for jury whether passenger, injured by being thrown from the platform of the coach by sudden movement of the train, was guilty of contributory negligence in being on platform. *Central of Georgia Ry. Co. v. Brown* (Ala.), 197.

CARRIERS OF PASSENGERS—Continued.

- Question for jury whether passenger was negligent in being on platform of moving car. *Brice v. Southern Ry. Co. (S. Car.)*, 178.
- Question for jury whether plaintiff acted with reasonable promptness in boarding train. *St. Louis, etc., Ry. Co. v. Hartung (Ark.)*, 142.
- Question for jury whether plaintiff was guilty of contributory negligence in attempting to board moving street car. *Orth v. Saginaw Valley Traction Co. (Mich.)*, 588.
- Reasonable promptness on the part of a passenger in entering a train depends largely upon the circumstances. *St. Louis, etc., Ry. Co. v. Hartung (Ark.)*, 142.
- Right of street car passenger, wishing to alight, to go to entrance and start down steps, while car is still running at high speed. *Caywood v. Seattle Elec. Co. (Wash.)*, 796.
- Riding upon platform of crowded car and paying fare while doing so. *Norvell v. Kanawha, etc., Ry. Co. (W. Va.)*, 148.
- Riding upon step of platform of electric street railway car. *Trussell v. Morris County Traction Co. (N. J.)*, 773.
- Rule that passengers must keep off platform of moving cars is not inflexible. *Brice v. Southern Ry. Co. (S. Car.)*, 178.
- Standing on car platform. *Clanton v. Southern Ry. Co. (Ala.)*, 120.
- Standing on platform of rapidly moving railroad car. *Norvell v. Kanawha, etc., Ry. Co. (W. Va.)*, 148.
- Standing on platform of rapidly moving train. *Clanton v. Southern Ry. Co. (Ala.)*, 120.
- Stepping from car in darkness under supposition that car is at usual stopping place. *Ouellette v. Grand Trunk Ry. Co. (Me.)*, 134.
- Where decedent was killed after alighting from street car by car passing in opposite direction as he was going around the end of his car, he was not bound "to ascertain" whether there was a car approaching on the other track from opposite direction, but was only required to use reasonable care for such purpose. *Stack v. East St. Louis, etc., Ry. Co. (Ill.)*, 410.
- Court could not declare as a matter of law that carrier was negligent in failing to have the drop doors over steps of vestibuled train down, while the train was standing at station, or in failing to maintain a light in the vestibule, in action for injury sustained by passenger from fall from car platform, where she was merely because the car was hot. *Clanton v. Southern Ry. Co. (Ala.)*, 120.

Damages.

- Apportionment of damages on account of contributory negligence. *Florida Ry. Co. v. Dorsey (Fla.)*, 556.
- Exemplary damages are allowable in action against railroad for willful injury inflicted by conductor upon passenger without lawful justification. *McDade v. Norfolk, etc., Ry. Co. (W. Va.)*, 554.
- Exemplary damages for ejection of passenger from train for rightfully refusing to sign a release of liability. *Schwartz v. Missouri, etc., Ry. Co. (Kan.)*, 764.
- One entitled to ride on mileage book coupons was not bound to tender his fare in money to prevent his ejection, in order to recover substantial damages therefor. *Harvey v. Atlantic C. L. R. Co. (N. Car.)*, 165.
- Railroad, without participation in such wanton acts, cannot be

CARRIERS OF PASSENGERS—Continued.

charged with punitive or exemplary damages for the illegal, wanton, and oppressive conduct of a conductor or brakeman towards passenger. *Moore v. Atchison, etc., Ry. Co. (Okla.)*, 776.

Vote could not be included as an element of damages for delay in transporting plaintiff where his right to vote had not been questioned, and no humiliation or indignity was offered him, and defendant carrier failed to carry plaintiff in time through purely an accidental happening, loss of. *Morris v. Colorado Midland Ry. Co. (Colo.)*, 572.

\$1,000 was excessive verdict, and should be reduced to \$500, in action for assault by deputy sheriff called upon by station agent to eject trespassers from station, where station agent called the officer's attention to his mistake and no serious injury was inflicted. *Whitlock v. Northern Pac. Ry. Co. (Wash.)*, 125.

Degree of Care.

Carrier is liable for the slightest negligence resulting in injury to passenger, and the utmost care and diligence of cautious persons to prevent such injury is imposed upon it by law. *Washington, etc., Ry. Co. v. Trimyer (Va.)*, 114.

Due passenger on mixed train. *St. Louis, etc., Ry. Co. v. Hartung (Ark.)*, 142.

Due passenger rightfully riding upon car platform. *Norvell v. Kanawha, etc., Ry. Co. (W. Va.)*, 148.

Duty to carry safely upon whatever part of car passenger has express or implied consent to ride. *Trussell v. Morris County Traction Co. (N. J.)*, 773.

Effect of contract between carriers as to stopping trains at intersection of their roads cannot control or affect the degree of care which a carrier owes to its passengers to avoid collisions. *Washington, etc., Ry. Co. v. Trimyer (Va.)*, 114.

Required of carrier. *Florida Ry. Co. v. Dorsey (Fla.)*, 556

Rule that carriers are liable for even a small degree of negligence causing injury to a passenger, and are required to use the highest degree of practicable care, diligence and skill in operating trains to prevent such injuries, applies to mixed trains. *St. Louis, etc., Ry. Co. v. Hartung (Ark.)*, 142.

Scenic railroad must be operated with the same degree of care for the protection of passengers as is required of common carriers of passengers. *O'Callaghan v. Dellwood Park Co. (Ill.)*, 182.

Where passenger was assaulted by a deputy sheriff called upon by station agent to eject certain trespassers from the station, the passenger was entitled to an instruction requiring carrier to exercise the highest degree of care to protect him from assault. *Whitlock v. Northern Pac. Ry. Co. (Wash.)*, 125.

Delay.

Certain instruction was misleading, as it bound defendant carrier to a guaranty of a train schedule by station agent, even though the passenger knew that the agent had no authority to do so. *Mulligan v. Southern Ry. Co. (S. Car.)*, 188.

Evidence was not sufficient to go to the jury on the issue of willful delay. *Mulligan v. Southern Ry. Co. (S. Car.)*, 188.

If the carrier negligently fails to make and post the public schedules required by statute, a passenger injured thereby may recover. *Mulligan v. Southern Ry. Co. (S. Car.)*, 188.

Where a passenger is chargeable with notice that the train schedules as published are not guaranteed by the carrier, he

CARRIERS OF PASSENGERS—Continued.

takes passage subject to such delays as are not due to the negligence or willful act of the carrier. *Mulligan v. Southern Ry. Co. (S. Car.)*, 188.

Discharging Passengers.

Complaint stated cause of action for starting car prematurely. *Knuckey v. Butte Elec. Ry. Co. (Mont.)*, 757.

Duty to give passengers time to alight. *Florida Ry. Co. v. Dorsey (Fla.)*, 556.

Stopping train on siding to permit another train to pass without informing passengers that the stop is not at a station platform, negligence cannot be inferred from the mere. *Ouellette v. Grand Trunk Ry. Co. (Me.)*, 134.

Drop doors over steps of vestibuled train down while train is standing at station, duty to keep. *Clanton v. Southern Ry. Co. (Ala.)*, 120.

Ejection.

Ejected passenger who did not tender his fare, and repudiated a tender of his fare by others, cannot claim any benefit from their offers. *Kirk v. Seattle Elec. Co. (Wash.)*, 493.

Failure to pay fare or present transfer, and claim of payment of first fare. *Kirk v. Seattle Elec. Co. (Wash.)*, 493.

Force that may be used. *Kirk v. Seattle Elec. Co. (Wash.)*, 493.

Offer by third person to pay fare, duty of conductor to accept. *Kirk v. Seattle Elec. Co. (Wash.)*, 493.

Offer by third person to pay fare, necessity of passenger's assent to. *Kirk v. Seattle Elec. Co. (Wash.)*, 493.

Where passenger was ejected from train because he had not exchanged his mileage book coupons for and presented a mileage ticket, though he offered to pay his fare, there was no such abuse of discretion by trial court as to authorize a review of its ruling on the ground that the damages were excessive, the trial court having reduced a verdict for plaintiff from \$5,000 to \$2,500. *Harvey v. Atlantic C. L. R. Co. (N. Car.)*, 165.

Evidence.

Contract between railroad companies as to stopping trains on approaching intersection was admissible on the question of whose negligence was proximate cause of collision in question. *Washington, etc., Ry. Co. v. Trimyer (Va.)*, 114.

Failure of defendant carrier on prior occasions to stop its trains at place in question. *Washington, etc., Ry. Co. v. Trimyer (Va.)*, 114.

In action for assault in ejecting plaintiff from street car, it was error to permit plaintiff to question witnesses as to expressions of sympathy on the part of the other passengers, and that he appealed to them to determine his action, and they insisted on his remaining. *Kirk v. Seattle Elec. Co. (Wash.)*, 493.

Plaintiff's testimony as to the posting of bulletins in the station in question by station agent, as to the time plaintiff's train was expected, was admissible, it being the agent's duty to give a passenger, upon request, information as to the arrival of the train he was to take. *Mulligan v. Southern Ry. Co. (S. Car.)*, 188.

Fallen from train, duties of all trainmen after passenger has. *Brice v. Southern Ry. Co. (S. Car.)*, 178.

Jars and Jolts.

Injuries were inflicted upon passenger on freight train by violently and without warning jerking the train after it had slowed

CARRIERS OF PASSENGERS—Continued.

up and stopped at station platform at destination, and after he, by direction of conductor, has arisen from his seat in car to alight, railroad was liable where. *St. Louis, etc., R. Co. v. Cox (Okla.)*, 565.

Negligence of carrier was question for jury where passenger riding on car steps was thrown off and killed by reason of speed of car around sharp curve. *Trussell v. Morris County Traction Co. (N. J.)*, 773.

Unnecessary sudden jerking of train while a passenger is rightfully alighting is negligence. *Florida Ry. Co. v. Dorsey (Fla.)*, 556.

Verdict was properly directed for defendant carrier, in action for injuries to street car passenger from fall upon car floor; there being no evidence of negligence on part of defendant. *Rhea v. Minneapolis St. Ry. Co. (Minn.)*, 194.

Limiting Liability.

Application of c. 274 of Kan. Laws of 1907, permitting carriers to limit their liability to passengers carried on mixed trains. *Schwartz v. Missouri, etc., Ry. Co. (Kan.)*, 764.

Overcrowding Cars.

Riding on car platform through necessity, liability of carrier for injury to passenger sustained while. *Norvell v. Kanawha, etc., Ry. Co. (W. Va.)*, 148.

Parties.

Under certain statute, passenger might sue jointly carrier and its servant whose negligence caused passenger's injuries. *Knuckey v. Butte Elec. Ry. Co. (Mont.)*, 757.

Pleading.

Complaint was broad enough to cover negligence of conductor in requiring passenger to leave coach and stand on car platform, in absence of allegation of specific negligence of a different sort. *Central of Georgia Ry. Co. v. Brown (Ga.)*, 197.

Presumption of Negligence.

Breaking of axle under tender and passenger injured through partial derailment of his car. *Pate v. Columbia, etc., R. Co. (Wash.)*, 752.

Certain evidence raised a prima facie presumption that scenic railway passenger's injuries were caused by the carrier's negligence. *O'Callaghan v. Dellwood Park Co. (Ill.)*, 182.

From proof of injury to passenger. *Roanoke, etc., Elec. Co. v. Sterrett (Va.)*, 749.

Injuries to passenger on train, in order to give rise to presumption of negligence on part of carrier, must have arisen from some instrumentality or agency of carrier. *Brice v. Southern Ry. Co. (S. Car.)*, 178.

Long delay in making schedule connections. *Mulligan v. Southern Ry. Co. (S. Car.)*, 188.

Mere fact that passenger fell upon floor of street car and was injured. *Rhea v. Minneapolis St. Ry. Co. (Minn.)*, 194.

Mere fact that passenger is injured while alighting from car is not sufficient to charge carrier with liability. *Knuckey v. Butte Elec. Ry. Co. (Mont.)*, 757.

Passenger injured while rightfully riding on car platform. *Norvell v. Kanawha, etc., Ry. Co. (W. Va.)*, 148.

Presumption that carrier was negligent because of long delay in making schedule connections rebutted the presumption that

CARRIERS OF PASSENGERS—Continued.

- carrier willfully caused the delay. *Mulligan v. Southern Ry. Co. (S. Car.)*, 188.
- Prima facie case was established against carrier, in action for injury to passenger through alleged premature starting of car as he was alighting. *Knuckey v. Butte Elec. Ry. Co. (Mont.)*, 757.
- Rebut presumption of negligence arising from fact that passenger was injured by reason of derailment of train, what must be shown in order to. *Reems v. New Orleans, etc., R. Co. (La.)*, 570.
- Rebuttal of prima facie case established by proof of injury to passenger. *Roanoke, etc., Elec. Co. v. Sterrett (Va.)*, 749.
- Where evidence shows that injury to passenger resulted, probably, from some unavoidable cause and one outside the ordinary supervision and control of the carrier. *Central of Georgia Ry. Co. v. Brown (Ala.)*, 197.
- Where nothing happened to car on which injured passenger was riding, and there was no collision nor breakage of anything. *Levin v. Philadelphia, etc., R. Co. (Pa.)*, 755.
- Where passenger is injured by equipment wholly under the carrier's control, and the accident is of such a character that it would not ordinarily occur if due care was used. *O'Callaghan v. Dellwood Park Co. (Ill.)*, 182.

Protection of Passengers.

- Duty to prevent use by passengers of profane and insulting language in the presence of female passenger. *Southern Ry. Co. v. Lee (Ala.)*, 583.

Receiving Passengers.

- Duty not to start street car while passenger is boarding it. *Orth v. Saginaw Valley Traction Co. (Mich.)*, 588.
- Duty of carrier of passengers on mixed trains to furnish reasonably safe means of entering cars and hold them in a reasonably safe manner for a reasonable time to permit passengers to enter with safety. *St. Louis, etc., Ry. Co. v. Hartung (Ark.)*, 142.
- Finding of negligence on part of conductor in giving signals for starting street car while passenger was boarding it was justified. *Orth v. Saginaw Traction Co. (Mich.)*, 588.

Rules and Regulations.

- Charge "that railroad company cannot promulgate an arbitrary rule for the conduct of passengers as will exempt them from liability for injuries inflicted by their sole negligence," correctness of. *Florida Ry. Co. v. Dorsey (Fla.)*, 556.
- Reasonableness of rule forbidding passengers to ride on front platform of street car. *Kirk v. Seattle Elec. Co. (Wash.)*, 493.
- Right to refuse passenger a transfer for violating rule forbidding riding on front platform of street car. *Kirk v. Seattle Elec. Co. (Wash.)*, 493.

Separation of Colored Passengers.

- Congressional inaction is equivalent to a declaration that a carrier may, by its regulations, separate white and negro interstate passengers. *Chiles v. Chesapeake, etc., Ry. Co. (U. S.)*, 173.
- Rule of railroad or state law prohibiting colored passengers from riding in same coach with white passengers did not justify carrier's employee in permitting other passengers to use pro-

CARRIERS OF PASSENGERS—Continued.

fane and indecent language in their effort to compel colored servant accompanying white passenger to leave coach. *Southern Ry. Co. v. Lee* (Ala.), 583.

Sick Passengers.

Question for jury whether train officers, knowing of condition of sick passenger who fell from platform of moving car, should have safe-guarded him. *Brice v. Southern Ry. Co.* (S. Car.), 178.

Snow and Ice.

That snow and ice had accumulated on steps of street car by being brought in on feet of passengers between the time a passenger boarded it and slipped in getting off it is not evidence of negligence. *Caywood v. Seattle Elec. Co.* (Wash.), 796.

Who Are Passengers.

Burden of proving that deceased mail clerk was in discharge of his official duties at the time of accident in which he was killed. *Schuyler v. Southern Pac. Co.* (Utah), 521.

Passenger has a right to the protection due a passenger until he has safely alighted by the proper egress. *Florida Ry. Co. v. Dorsey* (Fla.), 556.

Plaintiff was not a passenger after his horses were unloaded from car, nor had he any right to occupy such car as a sleeping place. *Chicago, etc., Ry. Co. v. Thurlow* (C. C. A.), 546.

Presumption is that one riding out of the place provided by railroad for passengers is not a passenger. *Chicago, etc., Ry. Co. v. Thurlow* (C. C. A.), 546.

Railway mail service employees. *Schuyler v. Southern Pac. Co.* (Utah), 521.

Relation continues until a reasonable time for passenger to leave railroad premises elapses. *McDade v. Norfolk, etc., Ry., Co.* (W. Va.), 554.

Relation of carrier and passenger may exist independent of any contract between the parties. *Schuyler v. Southern Pac. Co.* (Utah), 521.

Sufficiency of evidence to show that deceased railway mail clerk was on defendant's train in discharge of his official duties at time of accident in which he was killed. *Schuyler v. Southern Pac. Co.* (Utah), 521.

Termination of relation when passenger has reached his destination and has had reasonable time to alight and leave carrier's premises. *Chicago, etc., Ry. Co. v. Thurlow* (C. C. A.), 546.

Test in determining who are passengers. *Schuyler v. Southern Pac. Co.* (Utah), 521.

Where a passenger remained in a railway car 25 minutes after it had reached its station, which was the terminus of a road, he was no longer a passenger. *Schley v. Susquehanna, etc., R. Co.* (Pa.), 112.

CHILDREN.

See CROSSING; TRESPASSERS.

Contributory Negligence.

Child suing railroad for injuries received by being struck by train at public crossing must show that the negligence of the railroad was the proximate cause of the injury complained of though she was too young to be guilty of contributory negligence. *Illinois Cent. R. Co. v. Dupree* (Ky.), 88.

CHILDREN—Continued.

Of parent will bar an action by him for loss of services of his child resulting from latter's personal injuries. *Feldman v. Detroit United Ry.* (Mich.), 685.

Imputed Negligence.

Parent's contributory negligence will be imputed to his injured child, in action under certain statute, when. *Feldman v. Detroit United Ry.* (Mich.), 685.

Parent's negligence cannot be imputed to child, when. *Feldman v. Detroit United Ry.* (Mich.), 685.

Right of trainmen to presume that child near crossing will remain in place of safety. *Illinois Cent. R. Co. v. Dupree* (Ky.), 88.

COMMON CARRIERS.

See **BILLS OF LADING; CARRIERS; CARRIERS OF LIVE STOCK; CARRIERS OF PASSENGERS; CONNECTING CARRIERS; INTERSTATE COMMERCE; INTOXICATING LIQUORS; TICKETS AND FARES.**

Act of God.

Carrier is liable for accepting stock without suitable facilities for transportation, or when it knows, or by ordinary care should know, they will be exposed to injury from act of God or from any other exempted cause mentioned in certain statute. *Wahle v. Great Northern Ry. Co.* (Mont.), 467.

Carrier was bound to notice signs of approaching danger from act of God such as to awaken apprehension when means of avoiding it were available. *Wahle v. Great Northern Ry. Co.* (Mont.), 467.

Burden of Proof.

Burden is on carrier to trace loss or damage to negligence of the shipper or one or more of the exceptions with which its negligence did not concur. *Atlantic C. L. R. Co. v. Rice* (Ala.), 478.

In action against railroad for loss by fire in its depot, burden was on plaintiff to show that defendant was negligent. *Gulf, etc., Ry. Co. v. Ferguson-McKinney Dry Goods Co.* (Miss.), 484.

Under Ga. Civ. Code 1895, § 2265, "in order for a carrier or other bailee to avail himself of the act of God or exemption under the contract as an excuse, he must establish not only that the act of God or excepted fact ultimately occasioned the loss, but that his own negligence did not contribute thereto." *Atlanta etc., R. Co. v. Jacobs' Pharmacy Co.* (Ga.), 724.

Contract of shipment need not be in writing. *Alabama, etc., R. Co. v. Norris* (Ala.), 446.

Contributory Negligence.

Carrier not liable for loss caused by wrong or fault of shipper without negligence on its part. *Atlanta, etc., R. Co. v. Jacobs' Pharmacy Co.* (Ga.), 724.

In action against railroad company for value of contents of suit case that had been checked in its parcel room, a delay of about four hours in making inquiry about the suit case was not evidence of negligence of its owner. *Fraam v. Grand Rapids, etc., Ry. Co.* (Mich.), 241.

Damages.

Seller of the machinery shipped, under the conditions in question, could sue the carrier in case of its loss for its full value, and recovery could not be reduced by the amount paid by the

COMMON CARRIERS—Continued.

purchasers on account for which the seller was bound to account to them. *Southern Ry. Co. v. W. T. Adams Mach. Co. (Ala.)*, 230.

Degree of Care.

Carriers are not liable for acts of God or public enemy. *Atlantic C. L. R. Co. v. Rice (Ala.)*, 478.

Charge as to carrier's common-law liability as an insurer, which pretermitted all inquiry whether the goods were ready for delivery, was properly refused. *Southern Ry. Co. v. W. T. Adams Mach. Co. (Ala.)*, 230.

Advance in price of cotton destroyed. *Southern Ry. Co. v. Jones Cotton Co. (Ala.)*, 487.

Diligence required of carrier to protect and preserve freight from destruction after peril from fire has become apparent. *Atlanta, etc., R. Co. v. Jacobs' Pharmacy Co. (Ga.)*, 724.

Ga. Civ. Code 1895, § 2264, declares that a common carrier "as such is bound to use extraordinary diligence. In cases of loss the presumption of law is against him, and no excuse avails him unless it was occasioned by the act of God or the public enemies of the state." *Atlanta, etc., R. Co. v. Jacobs' Pharmacy Co. (Ga.)*, 724.

Required of carrier with respect to goods improperly packed accepted for transportation. *Atlantic C. L. R. Co. v. Rice (Ala.)*, 478.

Delay.

It was unnecessary, in order to recover for suffering by sick girl from delay in delivering medicine, that the order for the medicine made by her father and doctor, should have been made with her knowledge and approval. *Hendrick's Adm'r v. American Express Co. (Ky.)*, 245.

Delivery by Carrier.

Carrier hauling its cars onto private track of consignee for unloading must place the car in such position that it may be accessible for unloading. *Brooks Mfg. Co. v. Southern Ry. Co. (N. Car.)*, 248.

Carrier leaving car in its freight yards for unloading must place the car in such a part of them as to make it reasonably accessible for delivery before transportation ceases. *Brooks Mfg. Co. v. Southern Ry. Co. (N. Car.)*, 248.

Certain statutes of North Carolina neither impose a penalty for delay in delivery to the consignee after transportation ceases, nor compel a carrier to deliver loaded cars off its own right of way onto the private track of the consignee. *Brooks Mfg. Co. v. Southern Ry. Co. (N. Car.)*, 248.

Common carrier cannot be compelled to operate its engine on a private track belonging to a private corporation or individual over which the carrier has no control or supervision. *Brooks Mfg. Co. v. Southern Ry. Co. (N. Car.)*, 248.

Compliance with certain statute requiring notice of arrival of freight to be given by carrier within certain time. *Southern Ry. Co. v. W. T. Adams Mach. Co. (Ala.)*, 230.

Computation of reasonable time in which consignee may apply for and remove freight begins when it is at the place and ready for delivery in the manner usual or adopted by the parties. *Southern Ry. Co. v. W. T. Adams Mach. Co. (Ala.)*, 230.

Contract by which carrier agrees to deliver freight at a particular place to shipper's order, and to notify third persons at its desti-

COMMON CARRIERS—Continued.

nation of its arrival, made the latter the agents of the shipper to receive notice. *Southern Ry. Co. v. W. T. Adams Mach. Co. (Ala.)*, 230.

Delivery by Carrier.

If consignee had actual notice of arrival of the freight, and did not demand it within reasonable time thereafter, the character of notice of arrival is immaterial. *Southern Ry. Co. v. W. T. Adams Mach. Co. (Ala.)*, 230.

"Intermediate point," within certain statute, what is not an. *Brooks Mfg. Co. v. Southern Ry. Co. (N. Car.)*, 248.

Mailing of notice of arrival of freight, as required by certain statute, postage paid, is notice to consignee, but, where it does not comply with the statute, the fact that notice is mailed is only rebuttable evidence of its receipt. *Southern Ry. Co. v. W. T. Adams Mach. Co. (Ala.)*, 230.

Transportation ceases when the duty of the carrier as warehouseman commences, and, as to freight transported in car load lots, when the car reaches its destination and is placed for unloading. *Brooks Mfg. Co. v. Southern Ry. Co. (N. Car.)*, 248.

What notice shall be given as to arrival of goods at destination is a matter as to which parties to bill of lading may contract at their pleasure. *Southern Ry. Co. v. W. T. Adams Mach. Co. (Ala.)*, 230.

Delivery to Carrier.

Both compress company and railroad company were liable for loss from exposure of cotton to weather after delivery to compress company, where the owner of the cotton delivered to the railroad company the receipts of the compress company, and the railroad accepted them and issued bills of lading thereon to the owner. *Southern Ry. Co. v. Jones Cotton Co. (Ala.)*, 487.

Carrier's liability as insurer does not attach until the goods are unconditionally surrendered by the shipper and accepted by carrier. *Burrowes v. Chicago, etc., R. Co. (Neb.)*, 450.

Compress company as its agent to keep the cotton pending its loading into cars and became responsible for its negligence, railroad company recognized. *Southern Ry. Co. v. Jones Cotton Co. (Ala.)*, 487.

Duty and right of carrier to inspect proffered shipments and to refuse them when not properly packed, and to give shipper an opportunity to put them in proper condition for transportation. *Atlantic C. L. R. Co. v. Rice (Ala.)*, 478.

Duty to transport all goods offered for transportation. *Atlantic C. L. R. Co. v. Rice (Ala.)*, 478.

Limiting Liability.

As to interstate commerce, common carrier cannot contract for exemption from liability for injuries resulting from his own negligence. *Gilliland & Gaffney v. Southern Ry. Co. (S. Car.)*, 4.

Burden on carrier, under contract for interstate shipment of exempting itself from liability by showing that injury thereto resulted, not from its negligence but from breach of contract by the owner or shipper. *Gilliland & Gaffney v. Southern Ry. Co. (S. Car.)*, 4.

Certain statute making carriers liable for freight lost in interstate shipment does not prevent carrier from limiting its liability.

COMMON CARRIERS—Continued.

- ity to a particular valuation per hundredweight. *Larsen v. Oregon Short Line R. Co. (Utah)*, 718.
- Consideration to enable carrier to limit its liability, reduced rate or agreement to transport over its own line and that of a connecting carrier is sufficient. *Mobile, etc., R. Co. v. Brownsville Livery & Live Stock Co. (Tenn.)*, 714.
- Contract for interstate shipment of goods, limiting the liability of the carrier to loss occurring while the goods were in its possession and damages to stated amount, validity of. *Southern Express Co. v. R. H. Meyer Co. (Ark.)*, 13.
- Extent to which carrier may limit its liability under certain statute of Georgia. *Atlanta, etc., R. Co. v. Jacobs' Pharmacy Co. (Ga.)*, 724.
- Negligence of carrier. *Atlanta, etc., R. Co. v. Jacobs' Pharmacy Co. (Ga.)*, 724.
- Negligence of carrier or that of its servants. *St. Louis, etc., Ry. Co. v. Jones (Ark.)*, 212.
- Power of carrier of freight to limit its liability as an insurer. *Larsen v. Oregon Short Line R. Co. (Utah)*, 718.
- Power of carrier to limit its liability. *Mobile, etc., R. Co. v. Brownsville Livery & Live Stock Co. (Tenn.)*, 714.
- Rulings in regard to limiting liability except for gross negligence in contracts for carriage of live stock will not be extended so as to include transportation of goods generally. *Atlanta, etc., R. Co. v. Jacob's Pharmacy Co. (Ga.)*, 724.
- Shipper's lack of opportunity to ship under any other than a contract of limited liability, effect of. *Southern Express Co. v. R. H. Meyer Co. (Ark.)*, 13.
- Stipulated valuation of goods. *Ostroot v. Northern Pac. Ry. Co. (Minn.)*, 464.
- Stipulation that shipper releases all causes of action which have accrued to him by any prior contract does not have the effect of releasing the carrier from liability for damages already accrued, unless there is a second consideration for the release. *St. Louis, etc., Ry. Co. v. Jones (Ark.)*, 212.
- Stipulations for exemption from liability are to be construed strictly against the carrier. *Gilliland & Gaffney v. Southern Ry. Co. (S. Car.)*, 4.
- Time for suing, validity of stipulation limiting. *Missouri, etc., Ry. Co. v. Hancock (Okla.)*, 221.
- Unreasonable valuation of goods in contract. *Ostroot v. Northern Pac. Ry. Co. (Minn.)*, 464.
- Valuation of \$5 per hundred weight to which the liability of the carrier of the household goods in question was limited was not so inadequate as to be fraudulent on its face. *Larsen v. Oregon Short Line R. Co. (Utah)*, 718.
- Wearing apparel is not necessarily included within the term "household goods" when the question of good faith or fraud in fixing the value of such goods in a contract for carriage is involved. *Larsen v. Oregon Short Line R. Co. (Utah)*, 718.
- Where consignor of goods by express fails to place a value on the shipment, as called on to do by the bill of lading, filled out by him, the alternative provision thereby limiting the value to \$50 will prevent any further recovery. *D'Arcy v. Adams Express Co. (Mich.)*, 462.

Pleading.

- In action on contract of shipment, the first count of complaint stated a cause of action *ex contractu*, but the gravamen of the count aided by the amendment was the wrong committed in

COMMON CARRIERS—Continued.

misinforming the consignee as to the arrival of the machinery shipped, thereby preventing the consignee from applying for and receiving it; and was therefore ex delicto, and a departure from the cause of action originally stated. *Southern Ry. Co. v. W. T. Adams Mach. Co. (Ala.)*, 230.

Necessity of negating negligence on its part where carrier relies on fault of shipper or his agent. *Atlanta, etc., R. Co. v. Jacobs' Pharmacy Co. (Ga.)*, 724.

When plaintiff elects to bring action against railroad company for damages from failure to perform its duty as common carrier, instead of suing on contract of affreightment, it is not incumbent on him to set out precise terms of such contract. *Atlanta, etc., R. Co. v. Jacobs' Pharmacy Co. (Ga.)*, 724.

Presumption of Negligence.

Carrier, by proving that the damage in question was due entirely to a flood or act of God, rebutted the prima facie case against it, and the burden then shifted to the shipper to show that the negligence shown on the part of the carrier co-operated with the act of God in bringing about the damage to the shipment, in order to recover. *Armstrong, Byrd & Co. v. Illinois Cent. R. Co. (Okla.)*, 208.

Prima facie case against carrier where it is shown that oranges were delivered to carrier in good condition and by it to the consignee in damaged condition. *Armstrong, Byrd & Co. v. Illinois Cent. R. Co. (Okla.)*, 208.

Rates.

Fact that a competitive rate is less than the rate of the other competing carrier does not of itself constitute undue discrimination, within certain statute. *Railroad Commission v. Hocking Valley Ry. Co. (Ohio)*, 1.

Removal of Freight.

Reasonable time for removal of freight by consignee. *Southern Ry. Co. v. W. T. Adams Mach. Co. (Ala.)*, 230.

Shipper's negligence in packing and negligence of carrier in failing to prevent loss after its knowledge of existence of fire resulting from former's negligence, liability of carrier where there existed. *Atlanta, etc., R. Co. v. Jacob's Pharmacy Co. (Ga.)*, 724.

Termination of Liability.

Liability of carrier as insurer of goods after their arrival at their destination, until notice to consignee and until he has had reasonable time in which to remove them, may properly be said to be within the terms of the contract of carriage. *Gulf, etc., Ry. Co. v. Ferguson-McKinney Dry Goods Co. (Miss.)*, 484.

Removal of goods by consignee, what is reasonable time for. *Gulf, etc., Ry. Co. v. Ferguson-McKinney Dry Goods Co. (Miss.)*, 484.

Removal of goods from depot, what constitutes reasonable time for. *Gulf, etc., Ry. Co. v. Ferguson-McKinney Dry Goods Co. (Miss.)*, 484.

Right of shipper to have compress company deliver the cotton in question to the railroad company was such as to render a constructive delivery to the railroad insufficient to relieve the compress company of liability to shipper. *Southern Ry. Co. v. Jones Cotton Co. (Ala.)*, 487.

Terminate after arrival of goods at destination, when does carrier's liability as an insurer. *Gulf, etc., Ry. Co. v. Ferguson-McKinney Dry Goods Co. (Miss.)*, 484.

COMMON CARRIERS—Continued.**Warehousemen.**

Bailment for hire where railroad held itself out as willing to take charge of a suit case and redeliver it on presentation of check, and demanded and received a nominal compensation.

Fraam v. Grand Rapids, etc., Ry. Co. (Mich.), 241.

Information misleading consignee so as to prevent removal before the freight is lost, liability of carrier as warehouseman for giving incorrect. *Southern Ry. Co. v. W. T. Adams Mach. Co. (Ala.)*, 230.

Parcel room was left unattended for five or ten minutes, question of negligence was for jury where it was shown that. *Fraam v. Grand Rapids, etc., Ry. Co. (Mich.)*, 241.

Railroad company in maintaining parcel room where, for a nominal charge, persons may have their belongings cared for does not act in its capacity as a common carrier, but as a warehouseman. *Fraam v. Grand Rapids, etc., Ry. Co. (Mich.)*, 241.

CONNECTING CARRIERS.

See **BILLS OF LADING; INTERSTATE COMMERCE.**

Limiting Liability.

Constitutionality of provision of certain federal statute making the initial carrier liable for injury to an interstate shipment caused by it, or any connecting carrier, and providing that no contract shall exempt it from such liability. *Dodge v. Chicago, etc., Ry. Co. (Minn.)*, 226.

Right of carrier to limit its liability to its own line. *Dodge v. Chicago, etc., Ry. Co. (Minn.)*, 226.

Rule that carrier may limit its liability to its own line has no application to interstate shipments. *Dodge v. Chicago, etc., Ry. Co. (Minn.)*, 226.

Presumptions.

Presumption that loss of part of shipment, for the whole of which it has receipted, occurred on terminal carrier's line. *Harter v. Charleston, etc., Ry. Co. (S. Car.)*, 205.

Proof that, when a shipment of shoes was delivered, three pair were missing, was prima facie evidence that the loss occurred while the shipment was in possession of terminal carrier. *Jenkins v. Atlantic C. L. Ry. Co. (S. Car.)*, 203.

CONSTITUTIONAL LAW.

See **CONTRIBUTORY NEGLIGENCE; EMPLOYERS' LIABILITY ACTS; INTERSTATE COMMERCE; RAILROADS.**

Constitutionality of certain statute providing that garnishment shall not issue in a cause where the sum demanded is not over \$200, and where the property sought to be reached is wages due defendant from a railroad, etc. *White v. Missouri, etc., R. Co. (Mo.)*, 703.

CONTRACTORS.

See **TRESPASSERS.**

CONTRIBUTORY NEGLIGENCE.

See **ACCIDENTS ON TRACK; CARRIERS; CROSSINGS; DEATH BY WRONGFUL ACT; MASTER AND SERVANT; LICENSEES; NEGLIGENCE.**

Apportionment of damages on account of contributory negligence, constitutionality of statutes providing for. *Florida Ry. Co. v. Dorsey (Fla.)*, 556.

CONTRIBUTORY NEGLIGENCE—Continued.**Burden of Proof.**

Plaintiff, in an action for negligence, must show that his injuries were not caused by his own want of reasonable care. *Clarke v. Connecticut Co. (Conn.)*, 375.

Degree of Care.

Care required to avoid injury from danger arising from another's negligence. *St. Louis, etc., R. Co. v. Carr (Ark.)*, 92.

Definition of, and when question for jury. *St. Louis, etc., R. Co. v. Carr (Ark.)*, 92.

Definition of such contributory negligence as bars recovery where defendant's negligence was not willful, wanton, or malicious. *Florida Ry. Co. v. Dorsey (Fla.)*, 556.

Effect of. *Belle Alliance Co. v. Texas, etc., Ry. Co. (La.)*, 43.

Effect of. *Florida Ry. Co. v. Dorsey (Fla.)*, 556.

Question for jury. *Clarke v. Connecticut Co. (Conn.)*, 375.

CORPORATIONS.

See MASTER AND SERVANT.

CRIMINAL LAW.

See INTOXICATING LIQUORS.

CROSSINGS.

See ACCIDENTS ON TRACK; CHILDREN; DEATH BY WRONGFUL ACT; FRIGHTENING TEAMS; INTER-STATE COMMERCE; STREET RAILWAYS.

Burden of Proof.

Burden of proving that negligence of railroad was cause of death of pedestrian struck by train at crossing. *Illinois Cent. R. Co. v. O'Neill (C. C. A.)*, 99.

Railroad was not entitled to an instruction making plaintiff negligent for not looking and listening for trains until it showed a state of facts which made the failure to look and listen negligence as matter of law. *Chicago, etc., Ry. Co. v. Hamilton (Ark.)*, 76.

Contributory Negligence.

Assume that trains will be run at lawful speed, and that the usual warnings will be given, right of one about to cross track to. *Case v. Chicago, etc., Ry. Co. (Iowa)*, 367.

Attempting to drive across street car track with knowledge that car is approaching. *Donohue v. Portland Ry. Co. (Ore.)*, 66.

Burden of proving want of due care on part of pedestrian killed by train at crossing. *Illinois Cent. R. Co. v. O'Neill (C. C. A.)*, 99.

Failure to see train when it must have been visible to an ordinary observer. *Illinois Cent. R. Co. v. O'Neill (C. C. A.)*, 99.

Gratuitous passenger in automobile and that required of its driver compared, car required of. *Clarke v. Connecticut Co. (Conn.)*, 375.

Gratuitous passenger in automobile, care required of. *Clarke v. Connecticut Co. (Conn.)*, 375.

Gratuitous passenger in automobile remaining in the vehicle with knowledge of the manner in which her husband operated it. *Clarke v. Connecticut Co. (Conn.)*, 375.

Pedestrian must use ordinary care to inform himself of the approach of trains before going upon highway crossing. *St. Louis, etc., R. Co. v. Carr (Ark.)*, 92.

CROSSINGS—Continued.

Right of pedestrian to rely upon railroad's duty to use care in running train to highway crossing. *St. Louis, etc., R. Co. v. Carr (Ark.)*, 92.

The words "plain sight," in certain instruction, meant nothing more than that the train was within the range of plaintiff's sight, and were, therefore, unobjectionable. *Case v. Chicago, etc., Ry. Co. (Iowa)*, 367.

Until traveler at crossing becomes aware of an approaching train it is not his duty to leave his vehicle and go to the head of his team to be in better position to control it. *Southern Ry. Co. v. Crawford (Ala.)*, 82.

Where driver of vehicle on approaching a railroad crossing looked for an approaching train and failed to see or hear one when he ought to have seen or heard it, his looking and listening was not a protection to another occupant of the vehicle, and he could not recover for an injury sustained in a collision with the train. *Stotelmeyer v. Chicago, etc., R. Co. (Iowa)*, 382.

Where plaintiff, while riding as a gratuitous passenger with her husband in his automobile, was injured in a collision with a street car, an instruction that she would be chargeable with contributory negligence only in case she saw or knew of the actual danger of the collision in time to warn her husband to stop the automobile, and neglected to warn him, was erroneous. *Clarke v. Connecticut Co. (Conn.)*, 375.

Degree of Care.

Care due public in running trains across streets and highways. *Gray v. Chicago, etc., R. Co. (Iowa)*, 420.

Care required of railroad to discover and repair any defects which would permit projections from the train which might injure pedestrians along the track. *St. Louis, etc., R. Co. v. Carr (Ark.)*, 92.

Railroad must exercise ordinary care in running its trains over highway crossing, and is not merely bound to avoid injuring pedestrian thereon after discovering his peril. *St. Louis, etc., R. Co. v. Carr (Ark.)*, 92.

Employment of incompetent engineer, resulting in railroad crossing accident, is negligence sufficient to justify a recovery if it was the proximate cause of the injury sued for. *Illinois Cent. R. Co. v. O'Neill (C. C. A.)*, 99.

Evidence.

Physical facts which characterize the crossing and its immediate vicinity, admissibility of evidence as to. *Gray v. Chicago, etc., R. Co. (Iowa)*, 420.

Specific instances of care which deceased used in crossing the crossing where he was struck by train and other crossings, and evidence of care that others used in crossing railroad tracks, admissibility of evidence of. *Gray v. Chicago, etc., R. Co. (Iowa)*, 420.

Flagmen.

Duty to keep at crossings. *Illinois Cent. R. Co. v. O'Neill (C. C. A.)*, 99.

Intersections.

It is a question for jury whether a street car company used proper care to avoid a collision at a railroad crossing. *Washington, etc., Ry. Co. v. Trimyer (Va.)*, 114.

CROSSINGS—Continued.**Last Clear Chance.**

Application of doctrine. *Illinois Cent. R. Co. v. O'Neill* (C. C. A.), 99.

Application of doctrine to railway crossing accidents. *Belle Alliance Co. v. Texas, etc., Ry. Co.* (La.), 43.

Lookouts.

Care required of those operating train approaching crossing. *Gray v. Chicago, etc., R. Co.* (Iowa), 420.

Object to project from passing train, so as to cause injuries to pedestrian, question for jury whether railroad was negligent in permitting. *St. Louis, etc., R. Co. v. Carr* (Ark.), 92.

Presumptions.

In action against railroad for death of pedestrian at crossing, fact of the accident does not of itself show negligence. *Illinois Cent. R. Co. v. O'Neill* (C. C. A.), 99.

In view of Kirby's Dig., § 6773, making all railroads responsible for damages caused by the running of their trains, railroad is prima facie negligent where a pedestrian is injured at a public highway crossing by being struck by an object projecting from a passing train. *St. Louis, etc., Co. v. Carr* (Ark.), 92.

Proximate Cause.

Failure of driver of other vehicle to look a second time for street cars and failure of motorman to stop car, when chargeable with notice that wagon was going upon track, in time to have prevented the collision. *Donohoe v. Portland Ry. Co.* (Ore.), 66.

Right of Way.

Street car operators must have cars under such control at crossing as to yield the driver of a vehicle the right to the use of a crossing acquired by reaching the crossing while the car is at such distance therefrom that it can be stopped in time to allow him to pass in safety. *Donohoe v. Portland Ry. Co.* (Ore.), 66.

Signals.

Actionable negligence to fail to give crossing signals, whether it is. *Southern Ry. Co. v. Crawford* (Ala.), 82.

Fact that the train was running at high rate of speed was not actionable negligence towards child which left a place of safety and darted across track immediately in front of it. *Illinois Cent. R. Co. v. Dupree* (Ky.), 88.

Failure to ring the bell on approach of train to crossing is not negligence towards person struck by train at the crossing who knew in time of the train's approach. *Illinois Cent. R. Co. v. Dupree* (Ky.), 88.

Object of statute requiring is to put highway traveler on his guard. *Southern Ry. Co. v. Crawford* (Ala.), 82.

Positive and negative testimony as to whether crossing signals were given, erroneous instruction as to comparative weight of. *Gray v. Chicago, etc., R. Co.* (Iowa), 420.

Violation of ordinance requiring as negligence. *Illinois Cent. R. Co. v. O'Neill* (C. C. A.), 99.

Speed.

Violation of speed ordinance as negligence. *Illinois Cent. R. Co. v. O'Neill* (C. C. A.), 99.

In suit for injuries to traveler at highway crossing the evidence

CROSSINGS—Continued.

was sufficient to present question for jury as to negligence in rapid speed of train. *Southern Ry. Co. v. Crawford* (Ala.), 82.

Stop, Look, and Listen.

Duty of highway traveler as affected by fact that safety gates are open. *Chicago, etc., Ry. Co. v. Hamilton* (Ark.), 76.

Evidence justified finding that for plaintiff to have again looked and listened for street cars, where he knew that any further observation would have been prevented until he arrived so near the track that he could not turn back, was uncalled for. *Horsman v. Brockton, etc., Ry. Co.* (Mass.), 62.

Fail to look and listen for trains before attempting to cross railroad track, whether it is negligence as matter of law to. *Chicago, etc., Ry. Co. v. Hamilton* (Ark.), 76.

Gratuitous passenger in automobile, care required of. *Clarke v. Connecticut Co.* (Conn.), 375.

Highway traveler is not required to look or listen at any particular place or given distance from a crossing, but only to do so at the time and place necessary in the exercise of ordinary care. *Donohoe v. Portland Ry. Co.* (Ore.), 66.

Induced to attempt to cross railroad track without looking and listening for trains by act of railroad agents. *Chicago, etc., Ry. Co. v. Hamilton* (Ark.), 76.

It is not proper to charge that if plaintiff could have seen the train at the time and place he testified to having looked and listened therefor he must be held to have seen it, or to have not looked and listened. *Case v. Chicago, etc., Ry. Co.* (Iowa), 367.

One about to cross a railroad track is not required, as matter of law, to look for trains at any given point. *Case v. Chicago, etc., Ry. Co. v. (Iowa)*, 367.

One is not required, as matter of law, to stop his team before attempting to cross railroad tracks. *Case v. Chicago, etc., Ry. Co.* (Iowa), 367.

Presumptively negligent for pedestrian to attempt to cross street railway tracks without looking and listening when if he had looked he would have discovered approach of car in time. *Donohoe v. Portland Ry. Co.* (Ore.), 66.

Question for jury whether plaintiff looked and listened for trains at proper place. *Case v. Chicago, etc., Ry. Co. v. (Iowa)*, 367.

Question whether pedestrian injured by street car exercised ordinary care in looking for car before attempting to cross track is usually for jury. *Donohoe v. Portland Ry. Co.* (Ore.), 66.

Rule that, where highway crosses steam railroad at grade, traveler who neglects either to look or listen for approaching trains before crossing, and passes on and is injured, cannot recover, does not apply in favor of street railways. *Horsman v. Brockton, etc., Ry. Co.* (Mass.), 62.

Street car tracks. *Dubose v. New Orleans, etc., Co.* (La.), 262.

Street railway crossings. *Donohoe v. Portland Ry. Co.* (Ore.), 66.

DAMAGES.

See CARRIERS; CARRIERS OF PASSENGERS; CONTRIBUTORY NEGLIGENCE; MASTER AND SERVANT; PERSONAL INJURIES; WATER AND WATERCOURSES.

Evidence.

In action for assault, it was error to permit plaintiff to introduce in evidence statement of traveling expenses, etc., covering over a year. *Kirk v. Seattle Elect. Co.* (Wash.), 493.

DAMAGES—Continued.

In action for personal injuries, it was error to permit plaintiff to give his opinion of the monetary extent of his damages. *Kirk v. Seattle Elect. Co.* (Wash.), 493.

Value of child's services was improperly omitted, certain opinion evidence as to. *Feldman v. Detroit United Ry.* (Mich.), 685.

Mitigation of Damages.

Rule that one injured by another's wrongful conduct must do whatever he reasonably can to avoid or lessen the effects of the wrong, does not apply until after the wrong has been committed or the contract has been broken. *Harvey v. Atlantic C. L. R. Co.* (N. Car.), 165.

DEATH BY WRONGFUL ACT.

See CROSSING.

Action for one's suffering cannot be joined with one for her death. *Hendrick's Adm'r v. American Express Co.* (Ky.), 245.

Action to recover for physical and mental pain and suffering, suffered by person injured before his death, survives to decedent's widow and children. *Illinois Cent. R. Co. v. O'Neill* (C. C. A.), 99.

Damages.

Husband and father, how to determine the measure of damages for death of. *Illinois Cent. R. Co. v. O'Neill* (C. C. A.), 99.

Plaintiff, as administrator, was entitled to recover damages for the death of his wife, and was not prevented because as husband he was entitled to her earnings, so that she could accumulate nothing, and was valueless to her estate. *Hunter v. Southern Ry. Co.* (N. Car.), 327.

Contributory Negligence.

Burden on plaintiff to show that deceased was in exercise of ordinary care at time he was injured. *Stack v. East St. Louis, etc., Ry. Co.* (Ill.), 410.

Plaintiff is not required to prove absence of contributory negligence on part of his intestate. *Danskin v. Pennsylvania R. Co.* (N. J.), 414.

Presumption of negligence on part of decedent does not arise from the fact that he was struck by a train at a crossing. *Danskin v. Pennsylvania R. Co.* (N. J.), 414.

Presumption that deceased use due care in approaching and going upon crossing. *Gray v. Chicago, etc., R. Co.* (Iowa), 420.

Survivor.

Where deceased was struck on head by trolley pole and survived 10 minutes to half an hour, it could not be said as matter of law that the survival act in question was not applicable. *Ely v. Detroit United Ry.* (Mich.), 417.

DOGS.

See ANIMALS.

EMINENT DOMAIN.**Damages.**

Telephone line upon railroad right of way, unless it makes provision for that just compensation which the constitution secures when private property is taken for public use, the Legislature cannot authorize the location of a. *Canadian Pac. Ry. Co. v. Moosehead Telephone Co.* (Me.), 351.

EMINENT DOMAIN—Continued.

- Legislature has the power to authorize telephone corporation to construct its lines upon the right of way of a railroad company. *Canadian Pac. Ry. Co. v. Moosehead Telephone Co. (Me.)*, 351.
- Right of telephone company to construct its lines upon the right of way of a railroad is not to be presumed from a grant of a general power of eminent domain. *Canadian Pac. Ry. Co. v. Moosehead Telephone Co. (Me.)*, 351.
- When a telephone company is authorized by statute to construct and maintain its lines "upon or along a railroad," it is necessarily implied that it may "take" the right of way so far as is reasonably necessary for that purpose. *Canadian Pac. Ry. Co. v. Moosehead Telephone Co. (Me.)*, 351.

EMPLOYERS' LIABILITY ACTS.

See CONSTITUTIONAL LAW; FELLOW SERVANTS; INTERSTATE COMMERCE.

- Although a master is by statute made liable for an injury resulting from the negligent act of a fellow servant, it is essential to such liability that the act should have been done while in the prosecution of the master's business. *Jackson v. Chicago, etc., Ry. Co. (C. C. A.)*, 307.
- Certain statute requiring railroads to pay their employees wages in cash at least semimonthly, was intended to prohibit railroads from entering into contracts of employment containing provisions at variance with such act. *New York Cent., etc., R. Co. v. Williams (N. Y.)*, 689.
- Constitutional provision abolishing fellow servant rule with reference to railroad employees is not in conflict with federal constitution or its amendments. *Day v. Atlantic C. L. R. Co. (C. C. A.)*, 623.
- Constitutionality of certain statute providing that every railroad company operating a railway engine, car or train in state of Nebraska shall be liable to any of its employees, who at the time of injury are engaged in construction or the repair work of any engine, car or train of said company, for all damages which may result from the negligence of its agents, officers, or employees. *Swoboda v. Union Pac. R. Co. (Neb.)*, 631.
- Constitutionality of statute requiring railroads to pay their employees wages due them semimonthly, in cash. *New York Cent., etc., R. Co. v. Williams (N. Y.)*, 689.
- Constitutionality of Wis. Laws 1907, c. 254, as affected by clause excepting from operation of the act office and shop employees, who are not subject to same hazards as other railroad employees. *Kiley v. Chicago, etc., Ry. Co. (Wis.)*, 334.
- Constitutionality of Wis. Laws 1907, c. 254, imposing liability on railroad companies for injuries to their employees caused in whole or in greater part by the negligence of co-employees. *Kiley v. Chicago, etc., Ry. Co. (Wis.)*, 334.

Construction of.

- Certain constitutional and statutory provisions do not prevent railroad from adopting any reasonably safe methods in conducting its business or constructing its switches, nor do they change the rule that any risk due merely to the character of a switch is one of the risks of employment. *Potomac, etc., R. Co. v. Chichester (Va.)*, 611.
- Duty to equip cars with automatic couplers, under certain federal statute. *Johnson v. Great Northern Ry. Co. (C. C. A.)*, 617.
- Maintenance and operation of yard containing railroad tracks, the ties and rails for which were owned by a railroad and the real

EMPLOYERS' LIABILITY ACTS—Continued.

estate by a brewing company, was the operation of a railroad within certain fellow servant act. *Schoen v. Chicago, etc., Ry. Co. (Minn.)*, 658.

Mere fact that a railroad has frequently hauled interstate commerce traffic is not sufficient in a personal injury action to hold it amenable to the federal Safety Appliance Act. *Felt v. Denver, etc., R. Co. (Colo.)*, 735.

Modification of fellow servant rule, made by Ind. act of March 4, 1893, § 1, is not unconstitutional because construed to apply to all employees doing work essential to the carrying on of railway operations. *Louisville, etc., R. Co. v. Melton (U. S.)*, 340.

Not necessary to allege or prove that car was at the time actually loaded with interstate commerce, in action against railroad under federal statute requiring use of automatic couplers. *Felt v. Denver, etc., R. Co. (Colo.)*, 735.

One who is run down by a locomotive upon a railroad track is injured as the result of exposure to a railroad hazard. *Schoen v. Chicago, etc., Ry. Co. (Minn.)*, 658.

Unloaded car being used in interstate commerce, within meaning of federal Safety Appliance Act, when is an. *Felt v. Denver, etc., R. Co. (Colo.)*, 735.

Violation of federal statute requiring cars used in interstate commerce to be equipped with automatic couplers rendered railroad liable for injury to its employee, caught between such cars while trying to couple them; the questions of contributory negligence and assumption of risk being immaterial under certain statute. *Johnson v. Great Northern Ry. Co. (C. C. A.)*, 617.

EVIDENCE.

See CARRIERS OF LIVE STOCK; CARRIERS OF PASSENGERS; DAMAGES; MASTER AND SERVANT; STREET RAILWAYS.

Expert Testimony.

Testimony of witness that one link in chain was longer than others was not incompetent because he had little knowledge upon some matters to which he testified. *Potomac, etc., R. Co. v. Chichester (Va.)*, 611.

Res Gestæ.

Exclamation of motorman, made twenty minutes after car killed child, to angry crowd which had assaulted conductor, as follows: "Gentlemen, it is my fault." *Feldman v. Detroit United Ry. (Mich.)*, 685.

EXPRESS COMPANIES.

See COMMON CARRIERS.

FELLOW SERVANTS.

See EMPLOYERS' LIABILITY ACTS; MASTER AND SERVANT.

Different Department Limitation.

Kentucky rule. *Milton's Adm'x v. Frankfort, etc., Traction Co. (Ky.)*, 651.

Motormen of colliding cars are not fellow servants. *Milton's Adm'x v. Frankfort, etc., Traction Co. (Ky.)*, 651.

Superior Servant Limitation.

Kentucky rule. *Milton's Adm'x v. Frankfort, etc., Traction Co. (Ky.)*, 651.

FELLOW SERVANTS.—Continued.

Incompetency of fellow servant on account of drunken habits, liability of master for. *Johnson v. Lake Shore, etc., Ry. Co. (Mich.)*, 644.

Master is not liable to servant for negligence of a co-servant in respect to details of the work. *Cleveland, etc., Ry. Co. v. Foland (Ind.)*, 637.

Who Are.

Engine hostler in roundhouse and engineer of engine which kicked dead engine into roundhouse. *New York, etc., R. Co. v. Dailey (C. C. A.)*, 681.

Foreman of bridge crew and member of crew. *Cleveland, etc., Ry. Co. v. Foland (Ind.)*, 637.

Foreman of bridge crew and member of crew, were not fellow servants with respect to act in question, sufficiency of complaint to show that. *Cleveland, etc., Ry. Co. v. Foland (Ind.)*, 637.

General servants of compress company engaged in moving cars for railroad company on switch maintained for convenience of compress company were not fellow servants of a servant of the compress company injured by their negligence while he was engaged in a different employment for benefit of compress company. *Gulf, etc., Ry. Co. v. Gaskill (Tex.)*, 647.

Superior servant is not a vice principal in giving negligent order in process of changing work. *Cleveland, etc., Ry. Co. v. Foland (Ind.)*, 637.

Track foreman of logging railroad, when riding on front car to examine condition of roadbed, was not fellow servant of engineer of locomotive pushing the train. *Long Pole Lumber Co. v. Gross (C. C. A.)*, 669.

Vice principal while engaged in act of manual labor. *Cleveland, etc., Ry. Co. v. Foland (Ind.)*, 637.

Where a railroad and a brewing company operated yards and a locomotive therein jointly a janitor for adjacent buildings of the brewing company was not a fellow servant of the men in charge of the yard locomotive. *Schoen v. Chicago, etc., Ry. Co. (Minn.)*, 658.

FENCES.

See **RIGHT OF WAY.**

FIRES.

See **LICENSEES.**

FIRES SET BY LOCOMOTIVES.**Degree of Care.**

Railroad company was not negligent as to a fire destroying property not on its right of way if it used, by a competent and skilled engineer, in a careful way, all the precautions approved and in general use for confining sparks and cinders. *Deppe v. Atlantic C. L. R. Co. (N. Car.)*, 39.

Exemption from Liability.

Agreement by railroad to continue and operate side tracks was sufficient consideration for agreement of person for whom this was to be done that he would assume all risks to his buildings on the side tracks from sparks from company's locomotives. *Porter v. New York, etc., R. Co. (Mass.)*, 23.

Contract had the effect of releasing railroad from liability for

FIRES SET BY LOCOMOTIVES—Continued.

damage from negligently setting fire to property placed upon right of way. *Alabama, G. S. R. Co. v. Demoville (Ala.)*, 24.

Effect of railroad being exempt under contract with third person from liability for negligently setting fire to cotton seed house erected on its right of way by its consent, on right of plaintiff to recover against railroad for destruction of his cotton seed while in such house. *Alabama G. S. R. Co. v. Demoville (Ala.)*, 24.

In considering the origin of a fire in an action against a railroad for injuries therefrom, it is immaterial whether it started on or off its right of way. *Deppe v. Atlantic C. L. R. Co. (N. Car.)*, 39.

Origin of Fire.

Certain evidence was insufficient to require submission to jury of the question whether the locomotive in question set fire to plaintiff's building. *Miller-Brent Lumber Co. v. Douglas (Ala.)*, 35.

Question for jury whether defendant's locomotives was the origin of the fire in question. *Deppe v. Atlantic C. L. R. Co. (N. Car.)*, 39.

Presumption of Negligence.

Burden is upon railroad to show *prima facie* that a fire was communicated from an operated locomotive without company's negligence in construction, equipment, or operation of the locomotive. *Miller-Brent Lumber Co. v. Douglas (Ala.)*, 35.

From fact that fire originated from a locomotive casts on railroad the burden of proving it used all necessary precautions for confining sparks and cinders. *Deppe v. Atlantic C. L. R. Co. (N. Car.)*, 39.

FRIGHTENING TEAMS.**Noises.**

Wanton whistling of locomotive and reckless discharge of steam causing injuries resulting from frightening team, liability of railroad on account of. *Southern Ry. Co. v. Crawford (Ala.)*, 82.

Incident to operation of locomotives, liability of railroad for injuries resulting from noises. *Southern Ry. Co. v. Crawford (Ala.)*, 82.

Signals.

Failure to give statutory train signals as efficient cause of injury to traveler on highway, who, in absence of such signals goes so near track that an approaching train frightens his team. *Southern Ry. Co. v. Crawford (Ala.)*, 82.

Injuries to person who was driving on street along which its track extended, and whose horse was frightened by the approach of engine without the statutory signals, although he had not arrived at the street crossing the track, railroad was liable for. *Warn v. Chicago, etc., R. Co. (Iowa)*, 389.

GARNISHMENT.

See CONSTITUTIONAL LAW.

HEPBURN ACT.

See CARRIERS OF LIVE STOCK; TICKETS AND FARES.

IMPUTED NEGLIGENCE.

See CHILDREN.

INDEPENDENT CONTRACTORS.

Liability of railroad for death of person caused by negligence in blasting done by its independent contractor. *Hunter v. Southern Ry. Co.* (N. Car.), 327.

INTERSTATE COMMERCE.

See CARRIERS OF LIVE STOCK; COMMON CARRIERS; CONNECTING CARRIERS; EMPLOYERS' LIABILITY ACTS; TICKETS AND FARES.

Construction of U. S. Comp. St. Supp. 1907, p. 918, Supp. 1909, p. 1178, regulating interstate shipments of stock, in absence of federal decisions on the question. *Gilliland & Gaffney v. Southern Ry. Co.* (S. Car.), 4.

State Regulation.

Act requiring live stock to be transported within state of Kansas at not less than 15 miles an hour, * * *, does not apply to nor affect interstate commerce. *Leibengood v. Missouri, etc., Ry. Co.* (Kan.), 731.

General averments in answer, in action to recover damages for wrongful death caused by violation of Ga. Civ. Code, § 2222, requiring the slackening of speed at highway crossings, that such statute violates the commerce clause, etc., sufficiency of. *Southern Ry. Co. v. King* (U. S.), 45.

State's right to regulate manner in which interstate trains shall approach dangerous crossings, the signals which shall be given and the control of the trains shall be required. *Southern Ry. Co. v. King* (U. S.), 45.

To the extent that U. S. Comp. St. 1907, pp. 918, 919, Supp. 1909, pp. 1178, 1179, §§ 1, 2, fixes the duties and liabilities of the shipper and carrier in interstate transportation, it displaces any state law on the subject. *Gilliland & Gaffney v. Southern Ry. Co.* (S. Car.), 4.

Validity of Labor Law of New York requiring railroads to pay their employees wages semimonthly, in cash. *New York Cent., etc., R. Co. v. Williams* (N. Y.), 689.

Under certain federal statute, carrier of interstate shipment will be held liable for injuries resulting from its failure to supply proper shelter and protection when stock are unloaded to be fed and watered. *Gilliland & Gaffney v. Southern Ry. Co.* (S. Car.), 4.

What Is.

Cars used in interstate commerce, so as to be subject to certain federal safety appliances act, when are. *Johnson v. Great Northern Ry. Co.* (C. C. A.), 617.

Employed in interstate commerce on occasion in question,—within meaning of certain statute, whether railroad employees was. *Johnson v. Great Northern Ry. Co.* (C. C. A.), 617.

Shipment between points in same state which passes for short distance over territory of another state. *Leibengood v. Missouri, etc., Ry. Co.* (Kan.), 731.

Where it was not shown that the routing of freight shipped over several roads so as to take it out of the state for a part of the route was usual or necessary, it would be treated as an intrastate shipment, so that the agent of the terminal carrier was the agent of the initial carrier for purpose of receiving claim of loss under certain statute. *Harter v. Charleston, etc., Ry. Co.* (S. Car.), 205.

INTOXICATING LIQUORS.

Carrier is not punishable under Ky. St. § 2569a, making it unlawful to deliver intoxicants in prohibition territory, if he exercised good faith in accepting the shipment in question, and used ordinary care to avoid violating the statute. *Commonwealth v. Louisville, etc., R. Co. (Ky.)*, 727.

Indictment of carrier need not negative delivery within the proviso of certain statute making it unlawful to deliver intoxicants in prohibition territory, and providing that the act shall not apply to private liquor in personal baggage, etc. *Commonwealth v. Louisville, etc., R. Co. (Ky.)*, 727.

Ky. St. § 2569a, making it unlawful to deliver intoxicants in prohibition territory, is not void for uncertainty for prescribing no standard as to what is intoxicating liquor. *Commonwealth v. Louisville, etc., R. Co. (Ky.)*, 727.

JUDICIAL NOTICE.

That conductors are in control of street cars, and may cause them to be stopped at any time or place. *Orth v. Saginaw Valley Traction Co. (Mich.)*, 588.

LEASES AND RUNNING POWERS.

Lessee railroad would be liable, under certain statute, for damages caused by construction of bridge over ditch so as to obstruct free flow of water therein. *Delashmutt v. Chicago, etc., R. Co. (Iowa)*, 15.

Lessee's duty to protect passengers and others having a right upon its depot premises by keeping such premises and approaches thereto in a reasonably safe condition. *St. Louis, etc., R. Co. v. Caldwell (Ark.)*, 130.

Lessor's joint liability for negligence of lessee in so constructing bridge as to obstruct stream, where the lease of the railroad was authorized by certain statute. *Delashmutt v. Chicago, etc., R. Co. (Iowa)*, 15.

LIBEL.

See RAILROADS.

LICENSEES.

See FIRES SET BY LOCOMOTIVES; MASTER AND SERVANT; TRESPASSERS.

Building erected on right of way, with or without its consent, are negligently destroyed by fire, liability of railroad where. *Alabama G. S. R. Co. v. Demoville (Ala.)*, 24.

Contributory Negligence.

Walking along or attempting to cross railroad track, at point other than public crossing, without looking and listening for trains. *Chicago, etc., Ry. Co. v. Smith (Ark.)*, 51.

Contributory negligence of licensee walking along, or attempting to cross railroad track without looking or listening for trains, as affected by negligence of trainmen in failing to discover his peril in time. *Chicago, etc., Ry. Co. v. Smith (Ark.)*, 51.

Contributory negligence of licensees, in walking along or attempting to cross railroad track, without looking or listening for trains, as affected by failure of trainmen to perform statutory duty of keeping lookout. *Chicago, etc., Ry. Co. v. Smith (Ark.)*, 51.

Presumption of Negligence.

One engaged in shipping produce in cars was injured while

LICENSEES—Continued.

standing on station platform by being struck on head by something as freight train passed, railroad could not be made liable by the application of the doctrine of *res ipsa loquitur* where. *Eaton v. New York Cent., etc., R. Co.* (N. Y.), 252.

Railroad owes to person on its premises engaged in shipping produce the duty of exercising reasonable care, and it is not an insurer of his safety. *Eaton v. New York Cent., etc., R. Co.* (N. Y.), 252.

LOGGING RAILROADS.

See FELLOW SERVANTS.

Work Place.

Duty of master to maintain safe place to work, which in the case of a railroad means a safe roadbed, etc., applies to logging railroads. *Long Pole Lumber Co. v. Gross* (C. C. A.), 669.

MAIL CLERKS.

See CARRIERS OF PASSENGERS; TRESPASSERS.

MASTER AND SERVANT.

See CROSSINGS; EMPLOYERS' LIABILITY ACTS; FELLOW SERVANTS; INDEPENDENT CONTRACTORS; LOGGING RAILROADS.

Appliances.

Degree of care required of master in providing his servant with safe appliances for his work. *Florida E. C. Ry. Co. v. Lassiter* (Fla.), 600.

Assaults.

Railroad was not relieved from liability for the assault in question because of the official capacity of the special officer by whom it was committed, provided he was acting within scope of his authority at the time he arrested plaintiff for trespassing on railroad's property. *Baltimore, etc., R. Co. v. Strube* (Md.), 319.

Assumption of risk and contributory negligence are distinct and separate defenses, and the former may be pleaded, although the defense of the latter is precluded by statute. *Jackson v. Chicago, etc., Ry. Co.* (C. C. A.) 307.

Assumption of Risk.

Brakeman killed by low bridge. *West v. Chicago, etc., Ry. Co.* (C. C. A.), 663.

Engineer injured by running train over defective bridge. *Long Pole Lumber Co. v. Gross* (C. C. A.), 669.

Engineer struck by bridge while leaning out of cab window of engine. *Cloud v. Atchison, etc., Ry. Co.* (Kan.), 609.

Evidence did not show that brakeman knew of a defective stirrup on a car he attempted to mount. *St. Louis, etc., Ry. Co. v. Rogers* (Ark.), 297.

Fact that defect was discoverable by inspector of the master did not show that it was equally open to the observation of servant. *St. Louis, etc., Ry. Co. v. Rogers* (Ark.), 297.

General statement of rule precluding injured servant from recovering. *Jackson v. Chicago, etc., Ry. Co.* (C. C. A.), 307.

Negligence of master, dangers arising from. *St. Louis, etc., Ry. Co. v. Rogers* (Ark.), 297.

MASTER AND SERVANT—Continued.

Posting of notice on bulletin board by railroad that the "tell tales" were down at certain overhead bridge by which brakeman was killed, effect of. *West v. Chicago, etc., Ry. Co. (C. C. A.)*, 663.

Risk due merely to character of switch. *Potomac, etc., R. Co. v. Chichester (Va.)*, 611.

Right of engineer on logging railroad to rely on track foreman, who was on front car under orders from superintendent to keep a lookout and determine whether road bed was in a safe condition. *Long Pole Lumber Co. v. Gross (C. C. A.)*, 669.

Section hand killed by accidental discharge of gun customarily carried on hand car by his foreman for his own pleasure and benefit. *Jackson v. Chicago, etc., Ry. Co. (C. C. A.)*, 307.

Contributory Negligence.

Brakeman killed, while on top of car at night during storm, by low bridge at which there were no "telldales." *West v. Chicago, etc., Ry. Co. (C. C. A.)*, 663.

Choosing more hazardous method of performing work. *Florida E. C. Ry. Co. v. Lassiter (Fla.)*, 600.

Defects as are open to ordinary observation, servant need only take notice of such. *St. Louis, etc., Ry. Co. v. Rogers (Ark.)*, 297.

Duty of engineer to discover or anticipate and guard against any dangerous condition in roadbed, tracks, or bridges, correct instruction as to. *Long Pole Lumber Co. v. Gross (C. C. A.)*, 669.

In action for injury sustained by employee, while riding on side ladder of car, by being struck by car on side track, the defense of contributory negligence was fairly given to jury by the instruction in question. *Redmond v. Quincy, etc., R. Co. (Mo.)*, 283.

Intoxicated condition of freight conductor while on duty was discoverable by station agent, assisting him in removing freight from car, latter must ordinarily act with reference to such condition, when. *Johnson v. Lake Shore, etc., Ry. Co. (Mich.)*, 644.

Motorman, killed in a collision between his car and another car of his company, was guilty of contributory negligence in leaving car barn ahead of schedule time, and therefore there could be no recovery for his death although the motorman of the other car was also negligent. *Milton's Adm'x v. Frankfort, etc., Traction Co. (Ky.)*, 651.

Right of railroad employee, injured while switching cars, under immediate supervision of yardmaster, to trust that latter had done his duty by placing cars on side track far enough from main track to allow him to safely pass standing on ladder on side of car, without measuring the distance himself. *Redmond v. Quincy, etc., R. Co. (Mo.)*, 283.

Switchman riding on car being switched when a duty is to be performed at point of destination and the car is going faster than a man usually walks. *Florida E. C. Ry. Co. v. Lassiter (Fla.)*, 600.

Damages.

Liability of corporation in exemplary or punitive damages for act of agent. *Moore v. Atchison, etc., Ry. Co. (Okla.)*, 776.

Degree of Care.

Railroad was not negligent in handling its cars on a switch by gravity where the method was reasonably safe and had been

MASTER AND SERVANT—Continued.

used for many years without injury. *Potomac, etc., R. Co. v. Chichester (Va.)*, 611.

Evidence.

Usual conduct of employees required or permitted by railroad companies in the ordinary operations of trains upon question of care and diligence required in proper conduct of the business, admissibility of evidence of. *Florida E. C. Ry. Co. v. Lassiter (Fla.)*, 600.

Incompetent Servant, Retention of.

Where a servant has been in the employ of a master for four or five years without complaint having been made by any one as to his efficiency, character, or habits, the master can not be charged with negligence in retaining him. *Jackson v. Chicago, etc., Ry. Co. (C. C. A.)*, 307.

Injuries to Third Person.

Where defendant railroad had control of operation of cars on switch maintained for convenience of compress company, defendant was liable for negligence of those doing such work for it resulting in injury to a servant of compress company, though those operating the cars were also the general servants of the compress company, except as to operation of the cars. *Gulf, etc., Ry. Co. v. Gaskill (Tex.)*, 647.

Inspection.

Duty of railroad, as an employer, through its car inspector, to search for hidden defects in its cars. *St. Louis, etc., Ry. Co. v. Rogers (Ark.)*, 297.

In action for injuries to brakeman caused by defective stirrup on car he attempted to mount, the evidence justified a finding of negligent inspection by car inspector. *St. Louis, etc., Ry. Co. v. Rogers (Ark.)*, 297.

Protect servant against mere transitory perils that execution of work occasions, master is not required to. *Cleveland, etc., Ry. Co. v. Foland (Ind.)*, 637.

Proximate Cause.

Street car conductor can not recover for injury caused by falling from running board of his car, resulting from his right hand slipping from a defective side curtain and striking his left hand by which he was maintaining himself, since the accident was not a natural result of the defect. *Rich v. Asheville Elect. Co. (N. Car.)*, 313.

Question for jury whether car was dangerously overloaded, in action for death of brakeman while moving freight car by gravity. *Potomac, etc., R. Co. v. Chichester (Va.)*, 611.

Release.

Competent for employee to amend his petition by alleging that release in question was procured by fraud, in action for personal injuries alleged to have been sustained by him while traveling as a passenger on one of his employer's trains. *Southern Ry. Co. v. Nichols (Ga.)*, 767.

Relief Department.

Provision that, in case of injury, a member was required to elect between his right to sue his employer railroad or to receive benefits was not invalid as contrary to public policy. *Day v. Atlantic C. L. R. Co. (C. C. A.)*, 623.

MASTER AND SERVANT—Continued.

Relief department contract, by the which railroad employee was merely put to his election, on receiving an injury, between receiving benefits or suing the railroad for damages, was not in violation of. Const. Va. § 162. *Day v. Atlantic C. L. R. Co.* (C. C. A.), 623.

Rules.

Certain rule did not affect the obligations of defendant railroad and one of its brakemen, where the evidence showed that brakemen were not required to make a thorough examination like a car inspector, but were only required to make a general inspection. *St. Louis, etc., Ry. Co. v. Rogers* (Ark.), 297.

Scope of Employment.

Assault by special officer employed to look after railroad property and arrest trespassers. *Baltimore, etc., R. Co. v. Strube* (Md.), 319.

In an action against railroad company by foreman of a granite company for injury to plaintiff, through negligence of defendant's servants, while plaintiff was assisting defendant's conductor in repairing the brake of a car which was being placed on the granite company's side track, the evidence showed that plaintiff was engaged in a service within the scope of his employment and duties, in which his master and defendant had a common interest, so as to make defendant liable. *Hendrickson v. Wisconsin Cent. R. Co.* (Wis.), 258.

* Liability of corporation for torts committed by an agent or servant wantonly and recklessly. *Moore v. Atchison, etc., Ry. Co.* (Okla.), 776.

Section hand killed by accidental discharge of gun carried on hand car by his foreman for his own pleasure and benefit, railroad was not liable for death of. *Jackson v. Chicago, etc., Ry. Co.* (C. C. A.), 307.

Structures over or Near Tracks.

Evidence authorized finding that engineer's head, while he was leaning out of his cab window, in the line of his duty, collided with a girder of a bridge, too close to which defendant had negligently placed the track. *Cloud v. Atchison, etc., Ry. Co.* (Kan.), 609.

Negligence per se to maintain overhead bridge so low that it will strike brakeman when he is standing or walking on top of passing freight cars, whether. *West v. Chicago, etc., Ry. Co.* (C. C. A.), 663.

Prima facie case of negligence, from proof that clearance between rails and over-head bridge was more than two feet less than the standard or usual clearance maintained by deceased brakeman's company, overcome, how is. *West v. Chicago, etc., Ry. Co.* (C. C. A.), 663.

That a street railway violated statute requiring vestibule fronts on street cars does not render it liable for injury to conductor who fell from running board of his car through his right hand slipping from a side curtain and striking his left hand with which he was maintaining himself. *Rich v. Asheville Elect. Co.* (N. Car.), 313.

Warn and Instruct.

Master's duty to notify servant of defects and risks. *Florida E. C. Ry. Co. v. Lassiter* (Fla.), 600.

Work Place.

As affecting safety of employees, the location of railway siding

MASTER AND SERVANT—Continued.

or switch for freight purposes, as to its curves and grades, is ordinarily an engineering question, which the company is entitled to settle for itself. *Potomac, etc., R. Co. v. Chichester (Va.)*, 611.

Employer must use ordinary care to provide reasonably safe work place for his employees, but may choose any safe method for doing so; not being required to adopt the newest and best. *Potomac, etc., R. Co. v. Chichester (Va.)*, 611.

If a master provide structures which guard against all accidents which can reasonably be foreseen, he has done his duty in that respect to his employees. *New York, etc., R. Co. v. Dailey (C. C. A.)*, 681.

In question was not negligently constructed though the curves at one point were so sharp that locomotives could not run over it, and the grades were heavy, where the Y had been so maintained for 15 years without injury to anyone. *Potomac, etc., R. Co. v. Chichester (Va.)*, 611.

Question for jury whether trestle on logging railroad was constructed with due care. *Long Pole Lumber Co. v. Gross (C. C. A.)*, 669.

Railroad was not chargeable with negligence because space between engine and post in roundhouse was not wider than that which was usual and safe for employees under any circumstances to be reasonably anticipated. *New York, etc., R. Co. v. Dailey (C. C. A.)*, 681.

Where master furnishes his servants a reasonably safe place to work, he is not liable for a transitory danger arising out of a single occurrence in which he is not at fault, and of which he has no notice or opportunity to correct. *Redmond v. Quincy, etc., R. Co. (Mo.)*, 283.

NEGLIGENCE.

See ANIMALS; CARRIERS; CHILDREN; CONTRIBUTORY NEGLIGENCE; CROSSINGS; FIRES SET BY LOCOMOTIVES; FRIGHTENING TEAMS; LICENSEES; LOGGING RAILROADS; MASTER AND SERVANT; RAILROADS IN STREETS; STATIONS AND DEPOTS; STREET RAILWAYS; WATER AND WATERCOURSES.

Burden of Proof.

Plaintiff suing railroad for injuries received while on station platform waiting passage of train, in consequence of being struck on head by some sharp instrument, has the burden of proving the cause of the accident or a state of facts which will throw the onus on the railroad of explaining the occurrence. *Eaton v. New York Cent., etc., R. Co. (N. Y.)*, 252.

Comparative Negligence.

Comparative negligence does not obtain in Louisiana, doctrine of. *Belle Alliance Co. v. Texas, etc., Ry. Co. (La.)*, 43.

Instruction in question was not open to objection as authorizing recovery although plaintiff's negligence may have been preponderating cause of his injury. *Southern Ry. Co. v. Nichols (Ga.)*, 767.

Definition of. *Illinois Cent. R. Co. v. O'Neill (C. C. A.)*, 99.

Emergency, not error to refuse certain requested instruction in regard to care required of person confronted with an. *Atlanta, etc., R. Co. v. Jacobs' Pharmacy Co. (Ga.)*, 724.

Error to instruct jury what ordinary care or extraordinary care requires to be done in a particular case. *Atlanta, etc., R. Co. v. Jacobs' Pharmacy Co. (Ga.)*, 724.

NEGLIGENCE—Continued.

Extraordinary diligence, definition of. *Atlanta, etc., R. Co. v. Jacobs' Pharmacy Co. (Ga.)*, 724.

Last Clear Chance.

Doctrine of last clear chance does not involve the recognition of liability in case of concurrent negligence, and does not involve a case of comparative negligence. *Welsh v. Tri-City Ry. Co. (Iowa)*, 398.

Doctrine of last clear chance, statement of the. *Welsh v. Tri-City Ry. Co. (Iowa)*, 398.

May be shown by circumstances. *Alabama G. S. R. Co. v. Demoville (Ala.)*, 24.

"Ordinary" and "reasonable" care, definition of. *Colsch v. Chicago, etc., Ry. Co. (Iowa)*, 453.

Ordinary care, definition of. *Fraam v. Grand Rapids, etc., Ry. Co. (Mich.)*, 241.

Pleading.

Complaint should set out with reasonable certainty the facts claimed to constitute the negligence relied on. *Chicago, etc., Ry. Co. v. Smith (Ark.)*, 51.

Count in complaint was sufficient though it did not allege the particulars of defendant's negligence. *Southern Ry. Co. v. Crawford (Ala.)*, 82.

Presumptions.

Res ipsa loquitur, application of doctrine of. *Eaton v. New York Cent., etc., R. Co. (N. Y.)*, 252.

Unusual occurrence resulting in injury does not of itself raise the presumption of negligence of the person charged with the performance of some duty, but the accident must be such as necessarily to involve negligence. *Eaton v. New York Cent., etc., R. Co. (N. Y.)*, 252.

Proximate Cause.

Actionable must be proximate cause, negligence to be. *Southern Ry. Co. v. Crawford (Ala.)*, 82.

Definition of. *Chesapeake, etc., Ry. Co. v. Wills (Va.)*, 577.

Violation of statute must have proximately caused the injury complained of, to warrant recovery. *Rich v. Asheville Elect. Co. (N. Car.)*, 313.

Question for jury, except where a particular act is declared either by statutes or ordinance to constitute negligence, what is negligence is. *Atlanta, etc., R. Co. v. Jacobs' Pharmacy Co. (Ga.)*, 724.

What very prudent and thoughtful persons would do under certain circumstances, what must be considered in determining. *Atlanta, etc., R. Co. v. Jacobs' Pharmacy Co. (Ga.)*, 724.

Where two concurring causes produce an injury which would not have resulted in the absence of either, the party responsible for one cause is liable for the consequent injury, though the other cause is the act of God. *St. Louis S. W. Ry. Co. v. Mackey (Ark.)*, 279.

PARCEL ROOM.

See COMMON CARRIERS.

PARENT AND CHILD.

See CHILDREN.

PASSES.

See TICKETS AND FARES.

PERSONAL INJURIES.**Damages.**

Estimated profits and commissions in business. *Kirk v. Seattle Elect. Co. (Wash.)*, 493.

Expenses. *Kirk v. Seattle Elect. Co. (Wash.)*, 493.

Loss of earning power. *Kirk v. Seattle Elect. Co. (Wash.)*, 493.

Loss of profits. *Kirk v. Seattle Elect. Co. (Wash.)*, 493.

Mental suffering sustained by person falling down steps is inseparable from the physical suffering, and damages therefor are properly allowed. *Arkansas Midland Ry. Co. v. Robinson (Ark.)*, 792.

\$2,500 was not an excessive recovery for the injuries in question and resulting pain. *St. Louis, etc., Ry. Co. v. Hartung (Ark.)*, 142.

\$25,000 for personal injuries resulting in the amputation of both legs of plaintiff, 21 years old, earning from \$75 to \$85 per month as a brakeman, was not excessive verdict. *St. Louis, etc., Ry. Co. v. Rogers (Ark.)*, 297.

PLEADING.

See ANIMALS; CARRIERS OF PASSENGERS; COMMON CARRIERS; NEGLIGENCE.

POSTAL CLERKS.

See CARRIERS OF PASSENGERS; TRESPASSERS.

RAILROADS.

See ADVERSE POSSESSION; CARRIERS; JUDICIAL NOTICE; LEASES AND RUNNING POWERS; LOGGING RAILROADS; MASTER AND SERVANT; RIGHT OF WAY; STREET RAILWAYS.

Charge that if the language in question, though charging plaintiff with larceny of the freight referred to, was spoken by railroad's special agent in the course of his duty and it was necessary in the course investigation of the loss of the freight to make such communication and there was no malicious intent to injure plaintiff, the communication was privileged, was justified. *Lindsey v. St. Louis, etc., Ry. Co. (Ark.)*, 593.

Legislative power to amend charters of railroad companies in furtherance of public interest. *New York Cent., etc., Co. v. Williams (N. Y.)*, 689.

Slandorous words uttered by its employees, liability of railroad for. *Lindsey v. St. Louis, etc., Ry. Co. (Ark.)*, 593.

RAILROADS IN STREETS.

Question for jury whether defendant railroad was guilty of negligence, in action for injuries sustained by pedestrian while walking at night on the side of defendant's railroad track in a city in a path largely used by pedestrians, by being struck by a train approaching him from the rear. *Illinois Cent. R. Co. v. Flaherty (Ky.)*, 404.

Precautions to be observed in operating trains in towns and cities in order to avoid collisions with other users of streets. *Illinois Cent. R. Co. v. Flaherty (Ky.)*, 404.

RES GESTÆ.

See EVIDENCE.

RIGHT OF WAY.

See ADVERSE POSSESSION; EMINENT DOMAIN.

Abandonment by railroad of its right of way may be inferred from mere nonuser for 20 years, whether. *Lorick & Lowrance v. Southern Ry. Co. (S. Car.)*, 656.

Abandonment of railroad right of way, what constitutes. *Lorick & Lowrance v. Southern Ry. Co. (S. Car.)*, 656.

Abandonment of the portion not fenced, that railroad fenced in only 50 or 60 feet of its right of way of 100 feet is no evidence of. *Sheldon v. Michigan Cent. R. Co. (Mich.)*, 356.

Estopped to deny title of adjoining owner to part of right of way outside of fence in question, whether railroad was. *Sheldon v. Michigan Cent. R. Co. (Mich.)*, 356.

Line fence or acquiesced in its location as a boundary of its right of way, whether the railroad intended the fence in question to be a. *Sheldon v. Michigan Cent. R. Co. (Mich.)*, 356.

SCENIC RAILROADS.

See CARRIERS OF PASSENGERS.

SLANDER.

See RAILROADS.

SPURS AND SIDE TRACKS.

See FIRES SET BY LOCOMOTIVES.

Operation of certain yards and locomotive by a railroad and a brewing company was a joint enterprise directly connected with their respective activities. *Schoen v. Chicago, etc., Ry. Co. (Minn.)*, 658.

Word "maintain," as used in the covenant in question, did not require defendant railroad to continue to maintain and use the turnout and station permanently, and the length of time during which the covenant had been complied with constituted a substantial performance thereof, so that the railroad was not liable for damages for its breach. *Whalen v. Baltimore, etc., R. Co. (Md.)*, 273.

STATIONS AND DEPOTS.

See LEASES AND RUNNING POWERS; LICENSEES; SPURS AND SIDETRACKS.

Degree of Care.

Care required to keep in safe condition platforms and approaches and station grounds near platform where passengers go to board or leave trains. *Arkansas Midland Ry. Co. v. Robinson (Ark.)*, 792.

Duty to keep station platforms and their approaches, and station grounds in safe condition. *St. Louis, etc., R. Co. v. Caldwell (Ark.)*, 130.

Duty to Keep Open.

Liability of railroad for act of station agent in forcing woman in waiting room, waiting for a train, out of the room into the rain, in order to enforce reasonable rule for closing of depot building. *Texas Midland R. Co. v. Geraldton (Tex.)*, 106.

Person entering depot waiting room for purpose of taking train may remain there until his train arrives, subject to the right of the railroad to close its building at such hour as its reasonable rules may require. *Texas Midland R. Co. v. Geraldton (Tex.)*, 106.

STATIONS AND DEPOTS—Continued.

Facts warranted a finding of negligence in not protecting an approach to defendant's depot by a fence. *St. Louis, etc., R. Co. v. Caldwell* (Ark.), 130.

Implied notice to station agent of condition of woman resulting from her monthly sickness, rendering railroad liable for injuries received by her in consequence of being forced to leave waiting room in the rain. *Texas Midland R. Co. v. Geraldton* (Tex.), 106.

Question for jury whether railroad was negligent in failing to keep platform in safe condition. *Arkansas Midland Ry. Co. v. Robinson* (Ark.), 792.

STREET RAILWAYS.

See ACCIDENTS ON TRACK; CARRIERS OF PASSENGERS; CROSSINGS.

Contributory Negligence.

Pedestrian, by leaving place in rear of automobile and stepping on track, gave rise to the proximate cause of the accident. *Dubose v. New Orleans, etc., Co.* (La.), 262.

Pedestrian should stop, look, and listen before stepping on street car track. *Dubose v. New Orleans, etc., Co.* (La.), 262.

Question of fact whether plaintiff properly acted on his judgment that if the car came at the usual rate of speed he had ample time to go over. *Horsman v. Brockton, etc., Ry. Co.* (Mass.), 62.

Right of other user of street to assume that ordinance limiting speed of street cars will be observed. *Donohoe v. Portland Ry. Co.* (Ore.), 66.

Right of travelers to drive or work on street car tracks. *Horsman v. Brockton, etc., Ry. Co.* (Mass.), 62.

Where plaintiff, driving on a public street at right angle to street car tracks, saw a car at a standstill sixty feet or more away, when he was 15 or 20 feet from the track, and thinking he could cross in safety, started to do so, and the car struck the rear wheel of his vehicle, he was not negligent as matter of law. *Eustis v. Boston Elev. Ry. Co.* (Mass.), 60.

Contributory negligence of pedestrian will prevent recovery for his injuries, although the speed of the car by which he was struck was excessive. *Dubose v. New Orleans, etc., Co.* (La.), 262.

Evidence.

Injured person's knowledge of defendant's method of operating its cars, as to speed and sounding its gong at intersecting streets, which he claimed was not rung at the time of his accident, was relevant. *Horsman v. Brockton, etc., Ry. Co.* (Mass.), 62.

Last Clear Chance.

Duty of motorman seeing that person is apparently placing himself in a position of danger, without being aware of the car's approach; and railroad's liability for his failure to perform it, although there was also contributory negligence. *Welsh v. Tri-City Ry. Co.* (Iowa), 398.

Lookouts.

Difference between duty of motorman of street car and engineer of steam locomotive. *Welsh v. Tri-City Ry. Co.* (Iowa), 398.

STREET RAILWAYS—Continued.**Mutual Rights.**

Duty of those in charge of street cars to obey law of the road. *Horseman v. Brockton, etc., Ry. Co. (Mass.)*, 62.

Street Railway can not, by running its cars at an unusual and unlawful speed at crossings, make its limited right to use of highway a preferred right, nor can the driver of a vehicle escape responsibility for injuries resulting from his careless driving or lack of diligence. *Donohue v. Portland Ry. Co. (Ore.)*, 66.

Negligence.

Where the car was moving at a rate of speed forbidden by the town ordinances, and in violation of the rules of the road, and without giving the customary signals, the jury were justified in finding that the accident was caused by negligence of the motorman. *Horsman v. Brockton, etc., Ry. Co. (Mass.)*, 62.

Speed.

Car's rate of speed of 15 miles an hour while too rapid, has received some sanction. *Dubose v. New Orleans, etc., Co. (La.)*, 262.

Duty to regulate speed of street car to avoid injuring other users of streets at intersecting driveways or streets. *Horsman v. Brockton, etc., Ry. Co. (Mass.)*, 62.

Necessity of being careful about speed of street cars is not as urgent at 12 o'clock at night as it is during the active business hours of the day. *Dubose v. New Orleans, etc., Co. (La.)*, 262.

Speed in violation of ordinance as evidence of negligence. *Donohue v. Portland Ry. Co. (Ore.)*, 66.

Speed of car in violation of ordinance was proximate cause of his injury, other user of street guilty of contributory negligence can not recover unless. *Donohoe v. Portland Ry. Co. (Ore.)*, 66.

STREETS AND HIGHWAYS.

See RAILROADS IN STREETS.

TELEGRAPHS AND TELEPHONES.

See EMINENT DOMAIN.

TICKETS AND FARES.

See CARRIERS OF PASSENGERS.

Fares.

Contract providing for transportation to be issued in exchange for newspaper advertising is invalid. *State v. Union Pac. R. Co. (Neb.)*, 155.

To procure uniformity of charge by common carrier it must consist of money. *State v. Union Pac. R. Co. (Neb.)*, 155.

Under the law of Nebraska, a railroad company or other common carrier may not exchange transportation for services or property by way of barter. *State v. Union Pac. R. Co. (Neb.)*, 155.

Mileage Books.

Where holder of mileage book was prevented from exchanging coupons for mileage tickets, as by the railroad's failure to afford him reasonable facilities for making the exchange, the book became a complete contract of carriage, entitling him to

TICKETS AND FARES—Continued.

carriage without exchanging the coupons for the tickets. *Harvey v. Atlantic C. L. R. Co. (N. Car.)*, 165.

Passes.

Congress may, in prohibiting interstate carriers from issuing free transportation, except such persons from operation of the general prohibition as it may see fit. *Schuyler v. Southern Pac. Co. (Utah)*, 521.

Hepburn act can not be construed to prohibit the issuance of a free pass to an employee of railway mail service for transportation of such employee while not in actual discharge of his official duties. *Schuyler v. Southern Pac. Co. (Utah)*, 521.

Liability for death of employee of railway mail service as affected by fact that carrier issued him free transportation in violation of Hepburn act. *Schuyler v. Southern Pac. Co. (Utah)*, 521.

TRANSFERS.

See CARRIERS OF PASSENGERS.

TRESPASSERS.

See ANIMALS; LICENSEES.

Damages.

Where plaintiff, in course of his arrest by special officer of the defendant railroad, was severely beaten by him without justification, he was entitled to recover punitive damages. *Baltimore, etc., R. Co. v. Strube (Md.)*, 319.

Where plaintiff sued for excessive force used by defendant railroad company's special officer in course of his employment in arresting plaintiff for trespassing on defendant's right of way, the fact that plaintiff brought about his arrest by an altercation with the officer, and provoked the assault by resisting arrest was effectively merely in mitigation of punitive damages. *Baltimore, etc., R. Co. v. Strube (Md.)*, 319.

Degree of Care.

Care due from engineer to unintentional trespasser trying to keep his horse off of one track and struck by train on another track. *Demand v. New York Cent., etc., R. Co. (N. Y.)*, 56.

Due trespasser on train. *Chicago, etc., Ry. Co. v. Thurlow (C. C. A.)*, 546.

Railroad was not liable for injury to trespasser on freight car because derailing device at switch in question, which should have derailed the car and prevented it from going onto main track, was not in position or failed to operate. *Chicago, etc., Ry. Co. v. Thurlow (C. C. A.)*, 546.

Wantonly or willfully running train against trespasser at point where engineer or conductor knows it is the custom of the public to use the railroad roadbed as foot-paths railroad is liable for. *Birmingham So. R. Co. v. Fox (Ala.)*, 407.

Who Are.

Child 11 years of age who enters railroad yard for purpose of catching rides on trains, is a trespasser, and doctrine of the turntables cases has no application. *Berg v. Duluth, etc., Ry. Co. (Minn.)*, 392.

Evidence showed that deceased railway mail clerk was rightfully on defendant's train at time of accident. *Schuyler v. Southern Pac. Co. (Utah)*, 521.

TRESPASSERS—Continued.

Evidence was not sufficient to establish an invitation from railroad to boys to catch rides on cars in yards, though they were sometimes permitted to assist in cleaning cars and to ride upon them, and railroad was not liable to 11 year old boy, who was injured in attempting to catch a ride by grabbing hold of side ladder of car. *Berg v. Duluth, etc., Ry. Co. (Minn.)*, 392.
 Person walking on railroad track. *Birmingham So. R. Co. v. Fox (Ala.)*, 407.

Subcontractor employed without railroad's written consent was a technical trespasser on company's property. *Demand v. New York Cent., etc., R. Co. (N. Y.)*, 56.

TRIAL.

Agreement of plaintiff's counsel in criticising the agents of defendant in attempting to induce plaintiff to give a statement as to the manner of his injury was not ground for reversal, where the verdict was not in any way opposed to the weight of the evidence. *St. Louis, etc., Ry. Co. v. Rogers (Ark.)*, 297.

WAGES.

See CONSTITUTIONAL LAW; EMPLOYERS' LIABILITY ACTS.

WAREHOUSEMEN.

See COMMON CARRIERS.

WATER AND WATERCOURSES.

See LEASES AND RUNNING POWERS.

Concurring Negligence.

If negligence of railroad in constructing bridge over ditch concurred with that of builders of the ditch so as to cause water to overflow and injure plaintiff's land, the railroad would be liable for such damage, plaintiff not being at fault, with respect to the construction of the ditch. *Delashmutt v. Chicago, etc., R. Co. (Iowa)*, 15.

Damages.

Measure of damages where the defective manner in which a railroad company has constructed and maintained openings in its roadbed for draining adjoining land is only temporary, and can, and will be remedied. *St. Louis S. W. Ry. Co. v. Mackey (Ark.)*, 279.

Instruction merely required the exercise of reasonable care to construct railroad bridge so as not to obstruct such a volume of water as might reasonably be expected, and did not impose too great a burden upon the company. *Delashmutt v. Chicago, etc., R. Co. (Iowa)*, 15.

Liability of railroad for constructing bridge so as to obstruct watercourse. *Delashmutt v. Chicago, etc., R. Co. (Iowa)*, 15.

Where railroad builds across or alters the natural drainage of land, it must make suitable provision for carrying off even the waters of extraordinary freshets, which can reasonably be foreseen. *St. Louis S. W. Ry. Co. v. Mackey (Ark.)*, 279.

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